(16,861.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 288.

JOHN F. MALONY, APPELLANT,

vs.

O. H. ADSIT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

INDEX.

	Original.	Print.
Caption	1	1
Complaint	2	1
Summons	4	2
Marshal's return	5	2
Demurrer to complaint	6	3
Order overruling demurrer	7	3
Amended answer	8	4
Reply	11	5
Order taking cause under advisement	13	7
Findings of facts	14	7
Conclusions of law	15	8
Judgment	17	8
Motion for new trial	18	9
Stipulation to submit motion for new trial	20	10

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	Original.	Print.
Order overruling motion for new trial	22	11
Assignment of errors	23	11
Stipulation as to assignment of errors	30	15
Writ of possession	31	16
Marshal's return	32	17
Notice of appeal	33	17
Petition for appeal	34	18
Allowance of appeal	34	18
Affidavit of value	36	18
Bill of exceptions	38	19
Plaintiff's offers	38	19
Deed of Joseph Twan to Northwest Trading Co., May 6, 1882	40	21
Deed of Joseph Twan to Wm. Van Gaskan, March 22, 1888	42	22
Deed of Wm. Van Gasken to Alaska Mercantile and Packing Co., July 13, 1888	44	23
Deed of Alaska Mercantile and Packing Co. to Wm. J. Thompson, October 21, 1891	46	24
Deed of Wm. J. Thompson *et ux.* to O. H. Adsit, Mar. 24, 1894	48	25
Plaintiff's Exhibit No. 1—Articles of incorporation of the Alaska Mercantile and Packing Co	50	26
Location notice by W. E. Hunt	54	29
Deed of J. M. Cooper, attorney-in-fact for W. E. Hunt, to Joseph Twan, September 12, 1881	55	29
Deed of Wm. J. Thompson *et ux.* to O. H. Adsit, Mar. 24, 1894	57	31
Testimony of John Olds	60	32
Edward James	64	34
John Olds (recalled)	66	35
Edward James (recalled)	68	36
John C. Heid	69	37
Motion for nonsuit (overruled)	71	38
Defendant's offers	71	38
Defendant's Exhibit A—Deed of Orville T. Porter, United States marshal, to Alfred H. Gamel, November 24, 1891	72	38
B—Deed of A. H. Gamel *et ux.* to Emery Valentine, January 20, 1894	76	40
C—Deed of Emery Valentine to J. F. Maloney, January 20, 1894	78	42
D—Power of attorney from A. H. Gamel *et ux.* to J. F. Maloney, April 2, 1892	80	43
Testimony of John F. Maloney	83	44
O. H. Adsit	89	47
John Olds	90	48
Plaintiff's offers in rebuttal	91	48
Record in case of Shellhouse *vs.* Van Gaskin *et al*	91	49
Complaint	91	49
Entry of default	93	50
Judgment	94	50
Execution	94	51
Marshal's return	95	51
Notice to marshal	96	51
Writ of attachment	97	52

	Original.	Print.
Plaintiff's Exhibit No. 4—Notice of John G. Heid, attorney, to marshal, June 18, 1891	99	54
No. 5—Notice of John G. Heid, attorney, to marshal, August 20, 1891	100	54
No. 6—Advertisement of Alaska Mercantile and Packing Co., May 12, 1888	101	55
No. 7—Advertisement of Alaska Mercantile and Packing Co., Dec. 13, 1888	101	55
Acceptance of service of bill of exceptions	102	55
Agreement as to bill of exceptions	103	56
Judge's certificate to bill of exceptions	103	56
Bond	104	56
Citation (copy)	106	57
Order to certify the transcript of record	107	57
Clerk's certificate	108	58

1 THE UNITED STATES, }
District of Alaska, } ss:

Pleas and proceedings began and had in the district court of the United States for the district of Alaska at the adjourned November term, 1896.

Present: The Honorable Arthur K. Delaney, judge.

2 In the United States District Court for the District of Alaska.

OHLIN H. ADSIT, *Defendant,*
vs.
JOHN F. MALONY, Defendant. } Complaint.

The plaintiff complains and alleges:

I. That on the 29th day of April, 1891, and for more than nine years prior thereto, the plaintiff and his grantors have been the owners by right of prior occupancy and actual possession, and have at all times herein mentioned been the owners, and plaintiff now is the owner by reason of such prior occupation and possession of an undivided one-half part or interest of, in, and to that certain piece or parcel of land, the same being fifty feet in width by one hundred feet in length, situated on the corner of Second and Franklin streets, in the town of Juneau, district of Alaska, better described as lot numbered four (4), in block numbered four (4), according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881 by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, and that plaintiff is entitled to the possession thereof; that one James Winn is the owner of the other undivided one-half part or interest of, in, and to said described premises.

II. That while plaintiff and his grantors were so possessed the defendant and his grantor- on or about the 29th day of April, 1891, without right or title so to do, entered thereon and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto has- wrongfully withheld and still wrongfully withholds the possession thereof from him, the said plaintiff.

Wherefore the plaintiff prays judgment against the defendant:

I. For the recovery of the possession of an undivided one-
3 half part or interest of, in, and to the whole of said described premises.

II. For plaintiff's costs and disbursements in this action.

JOHNSON & HEID,
Attorneys for Plaintiff.

THE UNITED STATES, }
District of Alaska, } ss:

Ohlin H. Adsit, being first duly sworn, says: I am the plaintiff named in the foregoing-entitled action; that I have read the fore-

going complaint and know the contents thereof; that the said complaint is true, as I verily believe.

O. H. ADSIT.

Subscribed and sworn to before me this 22nd day of May, 1896.

[L. S.] F. D. KELSEY,
Notary Public for Alaska.

(Endorsed:) No. 508. In U. S. district court, district of Alaska. O. H. Adsit *vs.* Jno. F. Malony. Complaint. Filed May 25, 1896. Charles D. Rogers, clerk. Johnson & Heid, att'ys for plaintiff.

4 And afterwards, to wit, on said date, a summons was issued which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

OHLIN H. ADSIT
vs.
JOHN F. MALONY. } No. 508. Summons.

The President of the United States of America to John F. Malony, the above-named defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Sitka, in said district, and answer the complaint filed against you in the above-entitled action within 20 days from the date of the service of this summons upon you, and if you fail so to appear and answer for want thereof the plaintiff will take judgement against you for the recovery of an undivided one-half interest of, in, and to lot No. 4, in block No. 4, in the town of Juneau, Alaska, according to the plat of said town made by one J. C. Hanus, as is more fully set forth in the complaint filed herein, to which reference is hereby made.

And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable A. K. Delaney, judge of said district court, and the seal of said court, affixed at Sitka, in said district, this 25 day of May, 1896.

[L. S.] CHARLES D. ROGERS, *Clerk.*

JOHNSON & HEID,
Att'ys for Pl'ff.

5 THE UNITED STATES, }
District of Alaska, } *ss:*

I hereby certify that I received the within summons on the 26th day of May, 1896, and that on the 27th day of May, 1896, I served the same by delivering a copy hereof, together with a copy of the

complaint, to the within-named John F. Malony personally at Juneau, Alaska.

LOUIS L. WILLIAMS,
U. S. Marshal,
By WILLIAM HALE, *Deputy.*

Marshal's fee, $1.60.
Paid by O. H. Adsit.

(Endorsed:) No. 508. In the district court of the United States for the district of Alaska. O. H. Adsit *vs.* John F. Malony. Summons. Returned and filed June 8th, 1896. Charles D. Rogers, clerk.

6 And afterwards, to wit, on June 8, 1896, defendant filed his demurrer to the complaint; which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

O. H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant.

Comes now the defendant in the above-entitled action and demurs to the complaint of the plaintiff herein on the following ground, to wit:

That the complaint does not state facts sufficient to constitute a cause of action.

J. F. MALONY,
Attorney per Se.

(Endorsed:) No. 508. U. S. district court for the district of Alaska. O. H. Adsit, plaintiff, *vs.* John F. Malony, defendant. Filed June 8th, 1896. Charles D. Rogers, clerk. John F. Malony, attorney for defendant.

7 And afterwards, to wit, on October 9, 1896, the following further proceedings were had and appear of record in said cause, to wit:

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant. } No. 508.

Now, at this day, come the parties hereto, by their respective attorneys, and defendant's demurrer to plaintiff's complaint coming on to be heard, and the court, being sufficiently advised in the premises, overrules said demurrer, and defendant is granted leave to file an answer to said complaint within 30 days from date hereof.
Dated October 9th, 1896.

8 And afterwards, to wit, on December 8, 1896, defendant filed his amended answer to the complaint, which is in words and figures following, to wit:

In the United States District Court in and for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant.
} Amended Answer.

Leave of court being first had and obtained, for answer to the complaint in the above-entitled action the defendant, answering, says:

1st. That he denies that on the 29th day of April, 1891, or at any other time or at all, or that for more than nine years prior thereto that the plaintiff and his grantors have been the owners by right of prior occupancy and actual possession or have at any time been the owners of the premises hereinafter described, or that the plaintiff is now the owner or ever was such owner by reason of prior occupancy and possession or by any other reason whatever of an undivided one-half part or interest of, in, and to lot number four (4), in block number four (4), in the town of Juneau, and denies that the plaintiff is entitled to the possession thereof.

Admits that one James Winn is the owner of an undivided one-half interest in the above-described premises.

Denies that on the 29th day of April, 1891, or at any other time or at all did the defendant or his grantors, without right or title, enter upon said premises and oust and eject the plaintiff and his grantors therefrom, or that they have from said time or at all wrongfully withheld or withholds the possession from the plaintiff.

9

Second.

For his second defense and answer and by way of new matter, the defendant alleges:

1st.

That on or about the 24th day of November, 1891, one Alfred H. Gamel was in the quiet and peaceable possession and occupancy of an undivided one-half interest of lot number four (4), in block number four (4), according to the plat and survey of the town of Juneau, made by one G. C. Hanus, accepted and adopted in the year 1881 by the citizens of the town formerly known as Rockwell, but now as Juneau, Alaska.

2nd.

That on or about the 20th day of January, 1894, the said Alfred H. Gamel conveyed and transferred to this defendant all his right, title, and interest in and to the said lot and the buildings and premises thereon situated, and thereupon the said Gamel delivered the possession of said lot and premises to this defendant.

3rd.

That ever since said time this defendant, by himself and his tenants, have been in the quiet and peaceable possession and occupancy of said lot and premises and now is in the quiet and peaceable possession of the same.

4th.

That a period of more than three years has elapsed since this defendant and his grantors have been in the quiet and peaceable possession and occupancy of said lot and premises, and that the said defendant's estate and interest in said premises has not expired or ended, and that by reason thereof the plaintiff ought not now be allowed to maintain his said action.

Wherefore the defendant prays judgement that the plaintiff take nothing by his said suit and that he be discharged without day, and that he recover his costs and disbursements.

J. W. TRUMBULL,
Att'y for D'f't.

10 UNITED STATES, *District of Alaska,* } *ss:*

J. F. Malony, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the above and foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

JOHN F. MALONY.

Subscribed and sworn to before me this 8th day of December, 1896.

[L. S.] CHARLES D. ROGERS, *Clerk,*
By WALTON D. McNAIR, *Deputy.*

(Endorsed:) No. 508. Original. U. S. district court for the district of Alaska. Ohlin H. Adsit, plaintiff, *vs.* John F. Malony, defendant. Amended answer. Service of the within amended answer admitted by copy this 8th day of December, 1896. Johnson & Heid, attorneys for plaintiff. Filed December 8th, 1896. Charles D. Rogers, clerk, by Walton D. McNair, deputy cl'k. John Trumbull, attorney for defendant.

11 And afterwards, to wit, on December 12, 1896, plaintiff filed his reply to the answer of defendant, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant. } Reply.

The plaintiff replies to the answer of defendant, and referring to the second defense denies each and every allegation therein contained, and denies that on or about the 24th day of November, 1891, or at any other time or at all one Alfred H. Gamel was in the quiet and peaceable possession or possession at all and occupancy of an

undivided one-half interest or any interest of lot numbered four, in block numbered four, in the town of Juneau, Alaska, as described in defendant's second defense.

2.

Denies that on or about the 20th day of January, 1894, or at any other time, the said Alfred H. Gamel conveyed and transferred to the defendant all his right, title, and interest, or that the said Gamel had any right, title, and interest to convey in and to said lot and the buildings therein situated, and that the said Gamel delivered the possession of said lot to the defendant.

3.

Denies that ever since the time mentioned in defendant's second defense the defendant, by himself and his tenants, have been in the quiet and peaceable possession and occupancy of said lot and premises, and that he now is in the quiet and peaceable possession of the same.

12 Wherefore plaintiff demands judgement against the defendant, as prayed for in the complaint herein.

CHAS. E. PATTERSON AND
JOHNSON & HEID,
Attorneys for Plaintiff.

THE UNITED STATES, }
District of Alaska, } ss:

O. H. Adsit, being first duly sworn, says: I am the plaintiff named in the foregoing-entitled action; that I have heard read the foregoing reply and know the contents thereof; that the same is true, as I verily believe.

O. H. ADSIT.

Subscribed and sworn to before me this 12th day of November, 1896.

[L. S.] CHARLES D. ROGERS, *Clerk,*
By WALTER D. McNAIR,
Deputy Clerk.

Service with copy this day accepted at Juneau, Alaska, this 12th of December, 1896.

JOHN TRUMBULL,
Attorney for Defendant.

(Endorsed:) No. 508. In U. S. district court, district of Alaska. O. H. Adsit *vs.* J. F. Malony. Reply. Filed December 12th, 1896. Charles G. Rogers, clerk. C. E. Patterson and Johnson & Heid, attorneys for plaintiff.

13 And afterwards, to wit, on said date, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to wit:

O. H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant. } No. 508.

Now, at this day, come the parties hereto, by their respective attorneys, and stipulate in open court that this cause may be tried by the court without a jury, and, the same being called for trial and the evidence being heard and the argument of counsel, the court takes the matter under advisement.

14 And afterwards, to wit, on August 20, 1897, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to wit:

In the United States District Court for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant. } No. 508. Findings.

This cause having been regularly called for trial before the court—a jury trial having been expressly waived by stipulation in open court of the respective parties appearing herein—Johnson & Heid appeared as attorneys for the plaintiff and John F. Malony, the defendant herein, appeared in proper person; and the court having heard the proofs of the respective parties and considered the same and the records and papers in the cause and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

I. That on the 19th day of April, 1881, the plaintiff and his grantors entered into actual possession of all that certain lot, piece, or parcel of land described in the complaint as lot numbered four (4), in block numbered four (4), in the town of Juneau, district of Alaska, according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881 by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, said lot being situated on the corner of Second and Franklin streets, in said town of Juneau, claiming said lot, piece, or parcel of land in their own right; and the said plaintiff and his grantors have, ever since the date last aforesaid, occupied, used, and possessed said lot or piece or parcel of land, having erected a substantial frame or wooden building or structure thereon, using and claiming the same in
15 their own right from that date to the present time adversely to all the world, and especially as against the defendant.

II. That the plaintiff is the owner of an undivided one-half (½) part or interest of, in, and to said lot No. 4, in said block No. 4, hereinbefore described, and that the whole of said lot, piece, or parcel of land in the complaint described lies within the said town of Juneau, Alaska.

III. That on or about the 29th day of April, 1891, the defendant, without right or title so to do, entered on and upon said described lot, piece, or parcel of land in the complaint described and ousted

and ejected the plaintiff and his grantors therefrom, and from thence hitherto has wrongfully withheld the possession thereof from the said plaintiff.

As conclusions of law from the foregoing facts the court now hereby finds and decides:

1. That the plaintiff is the owner and entitled to the possession of an undivided one-half part or interest of, in, and to said lot, piece, or parcel of land as the same is described in the complaint on file herein as against the defendant and all persons claiming or to claim the same or any part of said right or interest of the plaintiff in and to said lot, piece, or parcel of land under him, the said defendant, and that the defendant has no right, title, or interest in or to said land or any part thereof.

2. That the plaintiff is entitled to a judgment, as prayed for in his complaint, for the recovery of the possession of an undivided one-half part or interest of, in, and to said lot No. 4, in said block No. 4, in said town of Juneau, against said defendant and all persons claiming or to claim the same or any part thereof under or through the said defendant.

16 3. That the plaintiff is entitled to a judgment for costs, to be taxed herein, against the defendant.

And judgment is hereby ordered to be entered accordingly.

Dated Aug. 10, 1897.

By the court:

ARTHUR K. DELANEY, *Judge.*

17 And afterwards, to wit, on said date, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to wit:

In the United States District Court for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant. } No. 508. Judgment.

This cause having been regularly called and tried by the court, and the findings of fact and conclusions of law and the decision thereon in writing having been duly rendered by the court, which are now on file in this cause, wherein judgment was awarded in favor of Ohlin H. Adsit, plaintiff, against John F. Malony, defendant, and for costs, on motion of Johnson & Heid, plaintiff's attorneys—

It is now, therefore, hereby ordered, adjudged, and decreed that the plaintiff have judgment, as prayed for in his complaint herein, against the defendant for the recovery of the possession of an undivided one-half part or interest of, in, and to lot No. 4, in block No. 4, situated in the town of Juneau, Alaska, and as described in the complaint on file herein, and that the plaintiff have such judgment, as aforesaid, against the defendant and all persons claiming or to claim the same or any part thereof under or through the said defendant, and that the plaintiff be, and he is hereby, declared to be

the true and lawful owner of the land described in the complaint and hereinbefore mentioned.

And it is hereby further ordered, adjudged, and decreed that the plaintiff do have and recover his costs, hereby taxed at $—, against the defendant.

By the court:

ARTHUR K. DELANEY, *Judge.*

Dated Aug. 10, 1897.

18 And afterwards, to wit, on said date, defendant filed his motion for a new trial, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant.

Comes now John F. Malony, the above-named defendant, by John R. Winn, his attorney, and moves this honorable court for a new trial in the above-entitled action for the following reasons and causes materially affecting the substantial rights of said defendant:

I.

Insufficiency of the evidence in said cause to justify findings number- one, two, three, and four and all of said findings made by the judge of the above-entitled court in said cause.

II.

Insufficiency of the evidence in said cause to justify conclusions of law number- one, two, and three and each of them and all the conclusions made and signed by the judge of the above-entitled court; also that said findings of fact and conclusion- of law are against law.

III.

Error in law occurring at the trial and excepted to by the said John F. Malony and his attorneys at the time and during said trial.

IV.

Insufficiency of evidence to justify the decision and judgement of said court, and also the court erred in law in rendering decision and judgement.

19 And reference is hereby made to all the record files of said court and proceedings of said court in the above-entitled action, and the same are made part of this motion.

Wherefore defendant asks and prays this honorable court that the findings of fact and conclusions of law and the judgement signed and rendered by this honorable court on the 10th day of August,

1897, and each of them *did* set aside and held for naught and a new trial *to* be granted.

JOHN R. WINN,
Attorney for Defendant.

Service of the within received this 11th day of August, 1897, and admitted by copy this 11th day of August, 1897.

JOHN G. HEID,
Attorney for Plaintiff.

(Endorsed:) No. 508. Original. U. S. district court for the district of Alaska. *U. S. district court for the district of Alaska.* Ohlin H. Adsit, plaintiff, *vs.* John F. Malony, defendant. Motion for new trial. Filed August 20, 1897. Charles D. Rogers, clerk. John R. Winn, attorney for defendant.

20 And afterwards, to wit, on said date, the defendant filed the following stipulation, which is in words and figures following, to wit:

In the United States District Court in and for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant.

This stipulation and agreement, made and entered into by and between John R. Winn, attorney for the above defendant, and John G. Heid, attorney for the above plaintiff, witnesseth:

Whereas the judge of the above-entitled court did on the 10th day of August, 1897, make his findings of fact, conclusions of law, and render judgment thereon against the said defendant, John F. Malony, and that on the eleventh day of August, 1897, John R. Winn, attorney for the said defendant, filed a motion for a new trial and rehearing in said cause, and said motion was on the said eleventh day of August, 1897, duly served on John G. Heid, attorney for said plaintiff:

Now, therefore, it is stipulated and agreed by and between John G. Heid, attorney for the plaintiff, and John R. Winn, attorney for the defendant, that the said motion for a rehearing and new trial be, and the same is hereby, submitted to the judge of the above-entitled court without argument, and the judge of said court is asked to make his ruling upon said motion, and that an exception be allowed to such ruling as he may make upon said motion.

JOHN G. HEID,
Attorney for the Plaintiff.
JOHN R. WINN,
Attorney for the Defendant.

21 (Endorsed:) No. 508. Original. In the United States district court in and for the district of Alaska. Ohlin H. Adsit,

plaintiff, *vs.* John F. Malony, defendant. Stipulation. Filed Aug. 20, 1897. Charles D. Rogers, clerk. John R. Winn, attorney for defendant.

22 And afterwards, to wit, on said date, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to wit:

OHLIN H. ADSIT, Plaintiff, *vs.* JOHN F. MALONY, Defendant. } No. 508. Order Denying Motion for New Trial.

Now, at this day, the motion for a new trial, filed herein, coming on to be heard on the written stipulation of the parties hereto, filed herein, the court, being fully advised in the premises, denies said motion, and defendant now excepts to the ruling of the court.

23 And afterwards, to wit, on August 31, 1897, pl'ff in error filed his assignment of errors, which is in words & figures following, to wit:

In the United States Circuit Court of Appeals for the Ninth Circuit.

OHLIN H. ADSIT, Defendant in Error, *vs.* JOHN F. MALONY, Plaintiff in Error. } Assignment of Error.

In the matter of the petition of John F. Malony, appellant and plaintiff in error.

Now comes the above-named plaintiff in error, by his attorney, John R. Winn, and says—

That in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

First.

The court erred in overruling defendant's demurrer to the plaintiff's complaint for the reason that said complaint did not state facts sufficient to constitute a cause of action.

Second.

The court erred in allowing the plaintiff to introduce any evidence under said complaint over the objection of the defendant for the reason that said complaint did not state facts sufficient to constitute a cause of action in this, to wit:

That it is not sufficient as a complaint *an* ejectment, for the reason that it does not appear that the said plaintiff has a legal estate in real property, and the nature of such an estate, whether in fee, for life, or for a term of years, as provided by the laws of Oregon, applicable to the Territory of Alaska.

24 That it is alleged that the defendant ousted the plaintiff and his grantors from the possession of an undivided one-

half interest of the property described in the complaint, and that he wrongfully withholds said interest from the plaintiff for the reason that the same is an impossible state of affairs and insufficient to maintain ejectment; *that*

That, considered as a complaint in forceable entry and detainer, it is fatally defective in not alleging a demand in writing at least ten days before the commencement of the action.

2½.

The court erred in overruling defendant's objections to the introduction in evidence of page 243 of Book "B" of the Juneau recording district, purporting to be a notice of location of lot four (4), in block four (4), by W. E. Hunt, on April 19th, 1891, for the reason that the same was incompetent, immaterial, and irrelevant, and no foundation for the introduction of the evidence had been laid, in this, that the original, if competent or material, was not accounted for; that there was no provision of the law at that time providing for the making, filing, or recording of such notices, or making of such notice any evidence of any rights in the premises, and there is no provision of the law making such purported record evidence, it not purporting to be an instrument certified, proved, or acknowledged in any manner.

Third.

The court erred in overruling the objection of the defendant to the introduction by the plaintiff of page eighty-eight (88) of Book "C" of deeds of the Juneau recording district, purporting to be the record of a conveyance from one J. M. Cooper to Joseph Twam of the lot in dispute, for the reason that it was not shown that said Cooper ever occupied or was in possession of said lot or had any claim thereto; that said Cooper purports to be the attorney-in-fact of W. E. Hunt, but that said conveyance was not executed by the said Hunt, by his attorney-in-fact; that there was no proof that Cooper was the attorney-in-fact; that said purported conveyance does not appear to have been acknowledged or proved to entitle it to be recorded; that there was no evidence that the same was ever executed by Cooper, as attorney-in-fact or otherwise. No foundation was laid whatever for its introduction, even if competent, relevant, or material.

Fourth.

The court erred in admitting in evidence, over the objection of the defendant, Book "B" of deeds, page 162, purporting to be the record of a mortgage or deed of trust from Joseph Twam to Northwest Trading Company, for the reason that the same appeared to be cancelled on the record; was entirely immaterial and irrelevant to the issues of the cause, as it did not show or pretend to show that said Twam ever occupied or was in possession of the premises in dispute.

That said purported record of said purported mortgage or deed of

trust is not a record, in this, that said purported instrument does not appear to have been acknowledged or certified or proved to entitle it to record under the laws of Oregon, then in force in the district of Alaska; and, further, that there was no proof whatever that said Twam ever executed such mortgage or deed of trust.

Fifth.

The court erred in admitting in evidence what purports to be the record of a deed from Joseph Twam to William Van Gasken of an undivided one-half of lot four (4), in block four (4), found in Book "B" One of deeds, page 446, over the objection of the defendant, for the reason that the same was immaterial and irrelevant, and the proper foundation had not been laid, in this:

26 That it did not appear by the evidence that the said Twam had any interest or *little* to convey.

Sixth.

The court erred in admitting in evidence what purported to be the record of a deed from William Van Gasken to the Alaska Mercantile and Packing Company of an undivided one-half interest in said lot four (4), found on page 583 of Book "B" 1 of deeds of the Alaska recording district, over the objection of the defendant, said deed purporting to be dated July 14, 1888—

For the reason that the same was immaterial and irrelevant to any issue in this cause, and, further, that the proper foundation had not been laid, in this: that it did not appear that the said Van Gasken had any title or interest in the said lot to convey.

Seventh.

The court erred in admitting in evidence, over the objection of this plaintiff, Exhibit —, purporting to be a certified copy of articles of incorporation of the Alaska Mercantile and Packing Company, certified to by the secretary of state of the State of Washington, for the reason that the same was not competent and the proper foundation for its admission had not been laid, in this: that it did not appear by any evidence that said purported articles of incorporation were in accordance with the laws of the State of Washington or the late Territory of Washington, or that the corporation had complied with the laws of the State of Washington, if any, relative to corporations, or that said purported corporation had any existence as a corporation in the State or Territory of Washington.

That it did not appear by any evidence that the said Alaska Mercantile — Packing Company had complied with the laws, if any, of the Territory of Washington relative to the filing and recording of articles of incorporation so as to make a certified copy evidence in the court of this district.

27 Eighth.

The court erred in admitting in evidence what purported to be the record of a conveyance from the Alaska Mercantile and Packing

Company to W. J. Thompson, found in Book "N," page 584, of deeds of the Juneau recording district, purporting to convey to said Thompson an undivided one-half interest in said lot four (4), for the reasons that the same was incompetent, immaterial, and irrelevant, it not appearing that the said mercantile and packing company was authorized to own or convey real estate, it not appearing that it had any interest in or title to said real estate;

And, further, it not appearing by any evidence that said purported conveyance was ever executed by the said corporation or authorized to be executed by the said corporation, and it appearing not to have been executed under its corporate seal;

And, further, said purported record is not a record and was wholly incompetent as evidence for the reason that it purports to have been executed in the State of Washington and acknowledged before a notary public, and before said deed was entitled to record in this district it was necessary that there should be a certificate attached hereto of the clerk or other proper certifying officer of a court of record of the county or district within which such acknowledgement was taken, under the seal of his office; that the person whose name is subscribed to the certificate of acknowledgement was at the date thereof such officer as he is therein represented to be, and that he believes the signature of such persons subscribed thereto to be genuine, and that the deed is executed and acknowledged according to the laws of such State.

It not appearing from the record that said purported deed had such certificate attached, it was not, under the laws of the State of Washington, then in force in the district of Alaska, entitled to be recorded, and it was wholly incompetent as evidence for any purpose.

28 Ninth.

The court erred in admitting in evidence Exhibit —, purporting to be a deed of the property in dispute from W. J. Thompson and wife to O. H. Adsit, and purporting to be recorded in Book Ten of deeds of the Juneau recording district, on page 13, over the objection of the defendant, for the reason that it did not appear by any evidence that said Thompson or wife were inhabitants of the town of Juneau, or ever were, or that they ever occupied or had been in possession of said premises, or that they had any title to or interest in said premises to convey.

And, furthermore, said deed was wholly incompetent as evidence for any purpose whatever and was not entitled to be recorded for the following reasons:

Said deed purports to have been acknowledged in the district of Alaska on the 24th day of March, 1894, before the county clerk of said district, and is signed by the county clerk with the seal of the superior court. The court was bound to take judicial notice of the fact that there is no such officer as a county clerk in the Territory of Alaska, there being no such subdivision in the Territory as counties, and that there is no such a court as a superior court.

Tenth.

The court erred in denying the defendant's motion for judgement of nonsuit at the close of plaintiff's case upon the ground of an entire failure of proof for these reasons:

First. That the evidence failed to show that the plaintiff was the owner, either by himself or grantors, either by the right of occupancy and possession or of any other right of the premises in dispute.

Second. That there was no evidence whatever of an ouster of the plaintiff by the defendant.

29 Eleventh.

The court erred in denying the defendant's motion for a new trial for the reasons and upon the grounds that the evidence was insufficient to testify the decision of the court, in this:

That there was no evidence showing or tending to show that the plaintiff was the owner of said premises or entitled to the possession of the same, or that he had any legal estate in said premises; that there was no evidence that the defendant ousted or ejected the plaintiff or his grantors from said premises, or that he wrongfully withholds the possession of said premises from the plaintiff.

2nd. Errors of law occurring at the trial and excepted to by the defendant, which are more particularly referred to in assignments of error herein numbered two to ten, inclusive.

Twelfth.

The court erred in rendering judgement for the plaintiff and against the defendant.

Wherefore the said defendant, J. F. Malony, prays that the said judgement of the United States district court for the district of Alaska may be reversed, and that the said district court for the district of Alaska be ordered to enter an order:

First. Sustaining the demurrer to the compalint in this action; or

Second. Sustaining the motion for a nonsuit; or

Third. Reversing the judgement of the court below and ordering a judgement upon the facts in the case to be entered in favor of the defendant; or

Fourth. Grant the motion for a new trial.

JOHN R. WINN,
Attorney for Plaintiff in Error.

30 In the United States Circuit Court of Appeals for the Ninth Circuit.

OHLIN H. ADSIT, Defendant in Error,
vs.
JOHN F. MALONY, Plaintiff in Error.

It is hereby stipulated by and between Ohlin H. Adsit and his attorney, John G. Heid, and John F. Malony, by John R. Winn, his

attorney, that the assignment of error hereto attached be, and the same is hereby, submitted to the Honorable A. K. Delaney, the judge who tried and determined said cause, for settlement, and all questions of service, time, and order of filing the same *is* hereby waived for the reason that Honorable C. S. Johnson is about to and will within a few days succeed the said Hon. A. K. Delaney in the office of United States district judge in and for the district of Alaska.

JOHN R. WINN,
Attorney for Plaintiff in Error.
JOHN G. HEID,
Attorney for Defendant in Error.

(Endorsed:) No. 508. U. S. district court for the district of Alaska. O. H. Adsit, plaintiff, *vs.* John F. Malony, defendant. Assignment of errors. Filed August 31st, 1897. Albert D. Elliott, clerk.

31 And afterwards, to wit, on Sept. 20, 1897, the following process was issued out of said court in said cause:

In the United States District Court for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant. } No. 508. Writ of Possession.

The President of the United States of America to the United States marshal for the district of Alaska, Greeting:

Whereas, on the 20th day of August, 1897, Ohlin H. Adsit, the plaintiff, recovered a judgment in the said United States district court for the district of Alaska against John F. Malony, defendant, for the possession of certain premises in said judgment and decree hereinafter more particularly described, and also for the sum of $—, costs and disbursements, as appears to us of record;

And whereas the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, at Sitka, in said district of Alaska, and the said judgment was docketed in said clerk's office, in said district, on the day and year first above written:

Now, therefore, you, the said marshal, are hereby commanded and required to place the said Ohlin H. Adsit in the quiet and peaceable possession of the lands and premises in said judgment and decree described as follows, to wit: An undivided one-half part or interest of, in, and to lot No. 4, in block No. 4, situated in the town of Juneau, Alaska, according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881 by the citizens of the town formerly known as Rock-
32 well, but now Juneau, Alaska, said lot being situated on the corner of Second and Franklin streets, in said town of Juneau.

Witness Hon. Charles S. Johnson, judge of said United States district court for the district of Alaska, at the court-house, in the town

of Sitka, in said district, and the seal of said court this 20th day of September, 1897.

[L. S.] ALBERT D. ELLIOT, *Clerk.*

(Endorsed:) No. 508. In U. S. dist. court, district of Alaska. Ohlin H. Adsit *vs.* John F. Malony. Writ of possession. Returned and filed Oct. 12th, 1897. Albert D. Elliot, clerk.

UNITED STATES, *District of Alaska,* } ss:

I hereby certify that I received the within writ of possession on the 20th day of September, 1897. I served the same by placing the within-named Ohlin H. Adsit in the peaceable and quiet possession of the within-described premises, personally, at Juneau, Alaska.

JAMES M. SHOUP,
U. S. Marshal,
By WILLIAM M. HALE.

Marshal's fee, 70c, paid by O. H. Adsit.

33 And afterwards, to wit, on Oct. 20, 1897, the defendant filed his notice of appeal, which is in words & figures following:

In the United States District Court in and for the District of Alaska.

OHLIN H. ADSIT, Plaintiff, *vs.* JOHN F. MALONY, Defendant. } No. —. Notice of Appeal.

To John G. Heid, attorney for the above plaintiff:

You will please take notice that the defendant in the above-entitled action hereby appeals to the United States circuit court of appeals for the ninth circuit from the judgment therein entered in said United States district court in and for the district of Alaska on the 20th day of Aug., 1897, in favor of the plaintiff in said action and against said defendant and from the *hold* thereof, and also from the order denying said defendant's motion for a new trial made and entered in the minutes of said court and signed by the said judge on the 20th day of Aug., 1897.

MALONY & WINN,
Attorney- for Defendant.

UNITED STATES, *District of Alaska,* } ss:

Due service of the within notice of appeal is hereby accepted in said district this 6th day of September, 1897.

JOHN G. HEID,
Attorney for Plaintiff.

Endorsed: No. 508. United States district court for the district of Alaska. O. H. Adsit, plaintiff, *vs.* John F. Malony, defendant. Notice of appeal. Filed Oct. 20, 1897. Albert D. Elliot, clerk.

34 And afterwards, to wit, on Jan'y 4, 1898, the defendant filed his petition and order, which is in words & figures following, to wit:

In the District Court of the United States in and for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant. } Petition and Order.

Comes now John F. Malony, by his attorney, John R. Winn, and petitions and shows to the court that the said defendant, feeling himself aggrieved by the judgment entered in the above-entitled cause on the 20th day of Aug., 1897, and denial of the motion for a new trial, did at said time file a notice of appeal in said cause to the circuit court of appeals for the 9th circuit, and that since said time the Supreme Court of the United States has rendered a decision, in which said court has held that causes of like kind and nature as the one herein stated are not appealable to the said circuit court of appeals for the 9th circuit, but that appeals should be prosecuted from such causes as herein mentioned direct to the Supreme Court of the United States; and for the reasons set forth in this petition petitioner prays that a transcript of the record and proceedings and all papers upon which said order was made, as hereinbefore mentioned, duly authenticated, should be sent to the Supreme Court of the United States.

MALONY & WINN,
Attorney- for Defendant and Appellant.

Dated Sitka, Alaska, Jan. 4the, 1898.

And now, to wit, on the 4 day of Jan., 1898, it is ordered that the appeal be allowed as prayed for.

CHARLES S. JOHNSON, *Judge.*

35 (Endorsed:) No. 508. United States district court for the district of Alaska. O. H. Adsit, plaintiff, *vs.* John F. Malony, defendant. Petition. Filed Jan. 4, 1898. Albert D. Elliot, clerk. Malony & Winn, attorneys for def't.

36 And afterwards, to wit, on said date, defendant filed an affidavit, which is in words & figures following:

In the District Court of the United States in and for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant. } Affidavit.

THE UNITED STATES, }
District of Alaska, } *ss:*

Emery Valentine, being first duly sworn, on oath deposes and says that he is a resident of the town of Juneau, district of Alaska,

and has been for more than eleven years last past; that he is well acquainted with the piece of property which is in controversy in the above-entitled action, being an undivided one-half interest in and to that certain piece or parcel of land, the same being fifty feet in width by one hundred feet in length, situate on the corner of Second and Franklin streets, of the town of Juneau, district of Alaska, particularly described as lot four (4), in block four (4), according to the plat and survey of said town of Juneau made by one G. C. Hennes and accepted and adopted in the year 1881 by the citizens of the town formerly known as Rockwell, but now Juneau; that affiant, being a resident of the said town of Juneau, has been a dealer to some extent in real property and has for more than eleven years last past been familiar with the values of property in the town of Juneau and what the same would sell for in the market, and affianced states that the value of the property in controversy in the above-entitled action is now and has been for more than one year last past the sum of $6,000—that is, the amount — the property in dispute in said cause of action exceeds the sum of $5,000, exclusive of
37 the costs in the above-entitled action and the cost to accrue in the same.

EMERY VALENTINE.

Subscribed and sworn to before me this 3rd day of January, 1898.
[SEAL.]
JOHN R. WINN,
Notary Public for Alaska.

(Endorsed:) No. 508. United States district court for the district of Alaska. O. H. Adsit, plaintiff, *vs.* John F. Malony, defendant. Affidavit. Filed January 4th, 1898. Albert D. Elliott, clerk. Malony & Winn, attorneys for def't.

38 And afterwards, to wit, on said date, defendant filed his bill of exceptions, which is in words & figures following:

In the United States District Court for the District of Alaska.

O. H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant.

Evidence Produced on the Trial.

It is at this time stipulated by and between counsel in the above-entitled suit that the records produced in court and sought to be introduced in evidence are the records of the Juneau recording district, Alaska.

Counsel for plaintiff offers in evidence the record of the trust deed purporting to convey the property in dispute, lot 4, in block 4, in the town of Juneau, from Joseph Twan to the Northwest Trading Company, as recorded in volumn B of Deeds, on page 162, dated January 5th, 1882.

Counsel for plaintiff also offered in evidence the record of a deed

from Joseph Twan to William Van Gasken for a portion of the lot in question, recorded in volumn B of Deeds, on page 446, dated March 22nd, 1888.

Counsel for the plaintiff offered in evidence the record of a deed from William Van Gasken to the Alaska Mercantile and Packing Company, recorded in volumn B of Deeds, on page 583, dated July 13, 1881, being a portion of the lot in dispute.

39 Counsel for the plaintiff offered in evidence the record of the deed from the Alaska Mercantile and Packing Company, by its president and secretary, to William J. Thompson, recorded in Book N of Deeds, at page 584, dated November 7th, 1891, being a portion of the lot in dispute.

Counsel for the plaintiff offered in evidence the record of the deed from William J. Thompson and wife to O. H. Adsit, recorded in Book 10 of Deeds, on page 13, dated April 4th, 1894, being a portion of the lot in dispute.

Counsel for plaintiff offered in evidence a certified copy of the articles of incorporation of the Alaska Mercantile and Packing Company and asked to have the same marked Plaintiff's Exhibit No. 1.

Counsel for the defendant objects, first, to the introduction of any evidence under the complaint on the grounds that it does not state facts sufficient to constitute a cause of action. The complaint alleges that the grantor of the plaintiff and the plaintiff were the owners of this property by occupation and possession for a period of nine years prior to April, 1891. We take the position that he does not come under the provisions of the Oregon code, where a party must have the legal estate, and the plaintiff is required by the Oregon code to set out his legal estate.

By the COURT: I will admit the records and the certificate of incorporation.

To which ruling of the court counsel for the defendant then and there duly excepted.

40 Counsel for the defendant also objects *of* the record in Book B, on page 162, on the grounds that it is incompetent, immaterial, and irrelevant, and that it further appears upon the pages of the record that the instrument has been cancelled, and that it does not appear that the instrument was ever acknowledged or certified to, entitling it to record under the laws of Oregon, and that the proper foundation for its introduction has not been laid.

By the COURT: There is one point suggested by Mr. Trumbell, and that is you have not laid the foundation for this evidence. The ground on which I hold these instruments admis-able is they are evidence tending to show occupation and possession.

To which ruling of the court counsel for defendant then and there duly excepted.

Counsel for defendant then makes the same objection to all of the record evidence thus far offered, and the court making the same ruling, the defendant's counsel reserving their exception.

All of the foregoing record evidence being admitted *are* as follows, to wit:

Deed.

Joseph Twan
to
Northwest Trading Co.

Know all men by these presents, that I Joseph Twan of Juneau, Territory of Alaska, in consideration of two hundred and thirty-two and $\frac{41}{100}$ dollars to me paid by the Northwest Trading
41 Company, of the same place and Territory the receipt whereof is hereby acknowledged, hereby give grant sell and convey unto the said Northwest Trading Company its successors and assigns a certain tract or parcel of land, situated in the town of Juneau, Territory of Alaska, bounded and described as follows to wit: That certain town lot or parcel of town property recorded at page 243 Book B of the records of the Harris mining district and there described as follows: Notice I claim lot four (4) in block four (4) in the town of Rockwell as a homestead.

April 23rd, 1881.
(Signed) W. E. HUNT.

April 23rd, 1881.
(Signed) R. DIXON, *Recorder.*

And said property is further and better described in a certain bill of sale from the said W. E. Hunt to the aforesaid Joseph Twan, recorded in Book G of the general records of Alaska, to which for greater certainty reference is hereby made:

Together with houses and privileges appurtenances thereto belonging, to have and to hold the above-granted premises to the said Northwest Trading Company its successors and assigns. That I am lawfully seized in fee-simple of the aforesaid-granted premises. That they are free from incumbrances. That I have good right to sell and convey the same to the said Northwest Trading Company, its assigns and successors forever as aforesaid, and that I will and my heirs executors and administrators shall warrant and defend the same to the said Northwest Trading Company, its heirs assigns and successors forever against all lawful claims and demands of all persons. Provided notwithstanding that if the said Joseph
42 Twan, his heirs executors and administrators shall pay unto the said Northwest Trading Company its assigns or executors the sum of two hundred and thirty-two and $\frac{41}{100}$ dollars four months from date of these presents with interest on said sum at the rate of one per centum per month payable monthly and until said payment keep the buildings standing on the land aforesaid, then this deed as also a certain promissory note bearing even date with these presents signed by the said Joseph Twan whereby the said Joseph Twan promises to pay to the said Northwest Trading Company the said sum and interest at the time aforesaid shall both be absolutely void to all intents and purposes and provided also

that until defaults of the payments of said sum or interest or either default as herein provided the mortgagee shall have the right to enter and take possession of the premises.

In witness whereof I have hereunto set my hand and seal this 6th day of May in the year of our Lord on- thousand eight hundred and eighty-two.

(Signed) JOSEPH TWAN.

Signed, sealed, and delivered in presence of—
EDWARD DE GROFF.
JOHN E. GREAM.

(There appears across the face of the record these words:) "Cancelled at the request of Carl Sphuhn, N. W. T. Co., and Joseph Twan. Oct. 6th, 1884."

Deed.

Joseph Twan
to
Wm. Van Gaskan.

This indenture made the 22nd day of March in the year of our Lord one thousand eight hundred and eighty-8 between
43 Joseph Twan of Juneau, Alaska, party of the first part, and William Van Gasken of Miles City Mont. Ty. the party of the second part. Witnesseth: That the said party of the first part for and in consideration of the sum of twelve hundred dollars, lawful money of the United States of America, to him in hand paid, by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents demise, release, and forever quitclaim unto the said party of the second part and unto his heirs and assigns, that certain lot, piece or parcel of land situated in the said Juneau, district of Alaska, and bounded and particularly described as follows to wit: An undivided one-half interest in that certain piece or parcel of land marked and designated as lot four 4 in block No. four on the G. C. Hanus survey of the town formerly known as Rockwell, now Juneau, and adopted by the citizens. Together with an undivided one-half interest in and to all improvements and buildings thereon situated, together with all fixtures therein contained. Together with all and singular the tenements hereditaments and appurtenances thereunto belonging, or in anywise appertaining and the reversion and reversions, remainder and remainders rents profits and issues thereof.

To have and to hold all and singular, the said premises together with the appurtenances unto the said party of the second part his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) JOSEPH TWAN. [SEAL.]

44 Signed, sealed, and delivered in presence of—
A. H. GAMEL.
G. B. JOHNSTON.

UNITED STATES, } ss:
District of Alaska, }

On this 22nd day of March, A. D. 1888, before me, a notary public in and for district of Alaska, personally came Joseph Twan, to me known to be the identical individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written. A. H. GAMEL,

[SEAL.] *Notary Public.*

Deed.

Wm. Van Gasken
to
Alaska Mercantile and Packing Company.

This indenture made the 13th day of July in the year of our Lord one thousand eight hundred and eighty-8 between William Van Gasken of Juneau Alaska, party of the first part and the Alaska Mercantile and Packing Company of Tacoma Washington Territory, the party of the second part; witnesseth: That the said party of the first part for and in consideration of the sum of one thousand dollars lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is
45 hereby acknowledged, does by these presents demise, release and forever quitclaim unto the said party of the second part and unto its assigns all that certain lot, piece, or parcel of land situated in said town of Juneau, district of Alaska, and bounded and particularly described as follows, to wit: An undivided one-half interest in and to that certain piece or parcel of land marked and designated on the G. C. Hanus survey of the town formerly known as Rockwell, now Juneau, as lot four (4) in block four (4), together with an undivided one-half interest in and to all buildings and improvements thereon situated, and reference is hereby made to a deed of conveyance of said piece of land from Joseph Twan to Wm. Van Gasken, recorded on page 446, in Book B 1 of records of Harris mining district, district of Alaska, and said reference is hereby made a part of this indenture.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to its assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

WILLIAM VAN GASKEN. [SEAL.]

Signed, sealed, and delivered in presence of—
C. S. BLACKETT.
A. H. GAMEL.

46 UNITED STATES, } ss:
District of Alaska, }

On this 13th day of July, A. D. 1888, before me, a notary public in and for district of Alaska, personally came Wm. Van Gasken, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntar*ily* act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

A. H. GAMEL,
Notary Public.

[SEAL.]

(*Deed.*)

Alaska Mercantile & Packing Co.
to
Wm. J. Thompson.

This indenture made this 21st day of October A. D. 1891 between the Alaska Mercantile & Packing Company a corporation duly organized and existing under the laws of the State of Washington with its principal place of business in Tacoma in said State, party of the first part and William J. Thompson party of the second part.

Witnesseth: That the said party of the first part for and in consideration of the sum of one dollar lawful money of the United States of America to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged does by these presents remise release and forever quitclaim unto the said party of the second part his heirs and assigns all that certain lot piece
47 or parcel of land situated in the town of Juneau district of Alaska bounded and particularly described as follows: The undivided one-half interest in and to that certain piece or parcel of land marked and designated as lot numbered 4 in block numbered 4 of the G. C. Hanus survey of the town formerly known as Rockwell, now Juneau and adopted by the citizens. Together with one-half interest in and to all improvements and buildings thereon situated together with all fixtures therein contained together with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining the reversion and reversions the remainder and remainders rents issues and profits thereof.

To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part in pursuance of a resolution of its trustees has caused its corporate name to be

hereunto signed by the hand of its president and to have its corporate seal hereunto annexed, the day and year first above written.

ALASKA MERCANTILE & PACKING COMPANY.
A. J. LITTLEJOHN, *President.*
WILLIAM BIRMINGHAM, *Secretary.*

Signed, sealed, and delivered in presence of—
FRED'K A. BROWN.
O. B. JONES.

STATE OF WASHINGTON, } ss:
County of Pierce, }

On this 21st day of October, 1891, before me, Frederick A. Brown, a notary public in and for the State of Washington, personally came A. J. Littlejohn, the president of the grantor herein named, and William Birmingham, the secretary of the grantor herein named, to me known to be the individuals who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntarily act and deed for the uses and purposes therein mentioned.

48

Witness my hand and seal this 21st day of October, 1891.

[SEAL.] FREDERICK A. BROWN,
Notary Public in and for the State of Washington, Residing at Tacoma.

Deed.

Wm. J. Thompson & wife
to
O. H. Adsit.

Know all men by these presents that we, William J. Thompson and Ellen W. Thompson, wife of the said William J. Thompson, both of the city of Tacoma, Washington, in consideration of five dollars to us paid by Ohlin H. Adsit, of the town of Juneau, district of Alaska, do hereby grant, bargain, sell, remise, release, and forever quitclaim unto the said Ohlin H. Adsit and unto his heirs and assigns all our right, title, and interest in and to the following-described parcel of land situated in the said town of Juneau, district of Alaska, to wit: The undivided one-half part or interest part or interest of, in, and to lot numbered 4, in block numbered 4, as per plat and survey of said town made by G. C. Hanus accepted and adopted by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska. Together with an undivided one-half part or interest of, in, and to all buildings and improvements thereon situated and located.

To have and to hold the same together with all and singular tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining unto the said Ohlin H. Adsit and to his heirs and assigns forever.

49

In witness whereof we have hereunto set our hands and seals this 24th day of March, A. D. 1894.

WILLIAM J. THOMPSON. [SEAL.]
ELLEN W. THOMPSON. [SEAL.]

Signed, sealed, and delivered in presence of—
J. M. BROWN.
DAVID SINCLAIR.

STATE OF WASHINGTON, } ss:
County of Pierce, }

This certifies that on this 24th day of March, 1894, before me, a county clerk in and for the said county, personally appeared the within-named William J. Thompson and Ellen W. Thompson, his wife, known to me to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

And that Ellen W. Thompson, wife of the said William J. Thompson, on an examination made by me separate and apart from her said husband, acknowledged to me that she executed the same freely and voluntarily and without fear or coercion or compulsion from any one.

In testimony whereof I have hereunto set my hand and seal the day and year last above written.

J. M. BROWN,
[SEAL.] *County Clerk and Clerk of the Superior Court.*

50 (PLAINTIFF'S EXHIBIT No. 1.)

UNITED STATES OF AMERICA, }
State of Washington. }

OFFICE OF THE SECRETARY OF STATE.

I, Allen Weir, secretary of state of the State of Washington, do hereby certify that I have carefully compared the annexed copy of the articles of incorporation of the Alaska Mercantile and Packing Company with the original articles now of record in this office, and find the same to be a true and perfect copy thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of the State of Washington. Done at Olympia this 23rd day of June, in the year of our Lord one thousand eight hundred and ninety-one.

ALLEN WEIR,
[SEAL.] *Secretary of State.*

Articles of Incorporation of the Alaska Mercantile and Packing Company.

Know all men by these presents, that we, the undersigned, residents of the Territory of Washington, and of the district or Territory

of Alaska, and citizens of the United States, have this day voluntarily associated ourselves together for the purpose of forming a corporation, under the laws of said Territory of Washington, and we do hereby make, certify, adopt and subscribed (in triplicate) the following certificate and articles of incorporation:

51 Article I.

The name of this corporation shall be "The Alaska Mercantile and Packing Company."

Article II.

The object for which this company is formed is as follows:

To carry on a general mercantile business in this Territory and at such point or points within the said district or Territory of Alaska as may be hereafter fixed and agreed upon, from time to time, by the board of trustees of this company, and under and in pursuance of any laws of said district or Territory of Alaska, or any laws or regulations of the United States applicable to foreign corporations carrying on business within said district or Territory of Alaska, and, further, to engage in the business of packing and preserving fish at any point or points within this Territory or said district or Territory of Alaska, under and in pursuance of the laws and regulations above referred to; and to do and perform any act or acts, and to construct and maintain any building or buildings and to do and perform all other acts necessary in carrying out, or cognate to, the foregoing objects of this company.

Article III.

The amount of the capital stock of this company shall be fifty thousand ($50,000) dollars divided into five hundred (500) shares, of the par value of one hundred ($100) dollars each.

Article IV.

52 The number of and the names of the trustees of this company who shall manage the concerns of the company for the first six months of its existence are as follows, namely: Amos F. Tullis, William Birmingham, Samuel R. McGown, Willard N. Pratt and William Van Gasken, all of whom shall be stockholders in the company, and are now citizens of the United States and residents of the Territory of Washington.

Article V.

The time of the existence of this company is hereby fixed at fifty (50) years from and after its incorporation.

Article VI.

The principal place of business of this company is to be located at the city of Tacoma, in the county of Pierce and in the aforesaid Territory of Washington.

In witness whereof, we the undersigned have hereunto set our hands and seals this twelfth day of March in the year of our Lord one thousand eight hundred and eighty-eight.

A. F. TULLIS.	[SEAL.]
WILLIAM BIRMINGHAM.	[SEAL.]
JNO. D. HOGUE.	[SEAL.]
A. J. LITTLEJOHN.	[SEAL.]
SAMUEL R. McGOWAN.	[SEAL.]
WILLARD N. PRATT.	[SEAL.]
WILLIAM VAN GASKEN.	[SEAL.]

Signed and sealed in presence of—
JAS. M. ASHTON.
W. O. CHAPMAN.

TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

Be it remembered that on this 12th day of March, in the
53 year of our Lord one thousand eight hundred and eighty-eight, before me, the undersigned, a notary public in and for Washington Territory, personally came Amos F. Tullis, William Birmingham, John D. Hogue, Andrew J. Littlejohn, Samuel R. McGown, Willard H. Pratt, and William Van Gasken, to me personally known to be the same persons who signed the foregoing articles of incorporation, and they each acknowledged to me that he signed, sealed, and executed the same freely and voluntarily and for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] JAS. M. ASHTON,
Notary Public in and for Wash. Terr.

Endorced: Articles of incorporation of the Alaska Mercantile and Packing Company. Dated March 12, 1888. Filed in the office of the secretary of Washington Territory M'ch 15th, 1888. Recorded M'ch 30, 1888, Book 2, page 107. N. H. Owings, secretary.
(Endorced:) Pl'ff'- Exhibit No. 1.

DISTRICT OF ALASKA, } ss:
Juneau Recording District, }

The within instrument was filed for record at 4 o'clock p. m. July 21, 1891, and duly recorded in Book N, on page 346, of the records of said district.

W. R. HOYT,
District Recorder.

54 Counsel for the plaintiff offers in evidence the location notice of lot 4, in block 4, of the town of Juneau, located by W. E. Hunt and recorded in Book B of Records, on page 243, and dated April 22nd, 1881.

Counsel for defendant objected to the introduction of the above record upon the grounds that the same is incompetent, immaterial, and irrelevant, and that the proper foundation for the same has not been laid.

Objection overruled by the court and the record admitted in evidence; to which ruling of the court counsel for defendant then and there duly excepted.

The above record, having been admitted in evidence by the court over defendant's objection, is as follows:

Location Notice.

I claim lot 4, in block 4, in the town of Rockwell, as a homestead.

April 22nd, 1881.

W. E. HUNT.

Counsel for plaintiff offered in evidence the record of the deed from W. E. Hunt to Joseph Twan of lot 4, in block 4, found in volumn C of Deeds, on page 88, dated September 12th, 1881.

Counsel for defendant objected to the introduction of said record in evidence upon the grounds that the proper foundation for the same has not been laid and as incompetent, immaterial, and for the further reason there is no evidence tending to show that J. M. Cooper *for* the attorney-in-fact for W. E. Hunt, and that the deed is not made as an attorney-in-fact, but purports to be the act of the attorney himself.

55 Objection overruled by the court; to which ruling counsel for the defendant then and there duly excepted.

The deed, being admitted in evidence over defendant's objection, reads as follows:

Know all men by these presents; that I, J. M. Cooper, attorney-in-fact for W. E. Hunt for and in consideration of the sum of twenty dollars lawful money of the United States in hand paid by Joseph Twan, the receipt of which is hereby acknowledged has bargained, sold and forever quitclaimed unto the said Joseph Twan and by these presents to forever quitclaim all my right title and interest in one town lot in the town of Rockwell Alaska, known as lot 4 in block 4 with all and singular the hereditaments and appurtenances belonging thereto.

Witness my hand and seal the 12th day of September, 1881.

J. M. COOPER,
Attorney-in-fact for W. E. Hunt.

Witness:
R. DIXON.
I. BOOKER.

Counsel for the defendant at this time interposes the following further objections, as follows:

Counsel for the defendant objects to the introduction in evidence of the deed from Joseph Twan to Wm. Van Gasken, recorded in

Book B 1, on page 446, upon the grounds that the same is incompetant, immaterial, and irrelevant, and that the proper foundation for its introduction has not been laid.

Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

Counsel for defendant objects to the introduction in evidence of the deed from Wm. Van Gasken to the Alaska Mercantile and
56 Packing Company, recorded in Book B 1, page 583, on the grounds that the same is incompetent, immaterial, and irrelevant, and that the proper foundation for its introduction has not been laid.

Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

Counsel for defendant objects to the introduction of the record of the deed from the Alaska Mercantile and Packing Company to William J. Thompson, in Book N, page 581, for the reason that the same is incompetent, immaterial, and irrelevant, and that the proper foundation has not been laid, in this, that it does not appear that there is any such corporation as the Alaska Mercantile and Packing Company, and that it does not appear that the parties who purport to execute the deed for the company were authorized to execute it, and that it does not appear to have been executed under the seal of the corporation, and therefore it does not make a *prima facie* case of authority in the parties purporting to act for the corporation. The deed appears to have been made in the State of Washington, the venue of the acknowledgement purports to be in the county of Pierce, in the State of Washington, the acknowledgement before a notary public, and it must appear before the deed can be admitted in evidence by a certificate of the clerk or other proper officer of the court of record of the county within which the acknowledgement was taken, under the seal of his office, that the person whose name is subscribed was at the date thereof such officer, and that he believes the signature of such person to be genuine, and that the deed is executed according to the laws of such State, Terri-
57 tory, or district; that the paper record is not a record in this, that it does not contain a sufficient acknowledgement to entitle it to record.

Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

Counsel for the defendant objects to the introduction of the articles of incorporation:

1st. For the reason that the proper foundation has not been laid, in this, that it does not appear that the articles comply with the laws of the State of Washington. It does not appear what is the law of the State of Washington in regard to incorporations.

2nd. That the certificate is insufficient in this, that it does not appear from the same that the articles or the certificate is in conformity with the law of Washington.

Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

Counsel for plaintiff offered in evidence the original deed from William J. Thompson and wife to Ohlin H. Adsit.

Counsel for defendant interposes the same objection as was made to the introduction of the record of the said deed.

Objection overruled; to which ruling counsel for defendant then and there duly excepted.

The deed, being admitted in evidence over defendant's objection, reads as follows:

Know all men by these presents that we, William J. Thompson and Ellen W. Thompson, wife of said Wm. J. Thompson, both of the city of Tacoma, Washington, in consideration of five dol-
58 lars to us paid by Ohlin H. Adsit, of the town of Juneau, district of Alaska, do hereby grant, bargain, sell, remise, release, and forever quitclaim unto the said Ohlin H. Adsit and unto his heirs and assigns all our right, title, and interest in and to the following-described parcel of land situated in the said town of Juneau and district of Alaska, to wit: An undivided one-half (½) part or interest of, in, and to lot numbered four (4), in block numbered four (4), as per plat and survey of said town made by G. C. Hanus, accepted and adopted by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska.

Together with an undivided one-half part or interest of, in, and to all buildings and improvements thereon situated and erected.

To have and to hold the same, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, unto said Ohlin H. Adsit and to his heirs and assigns forever.

In witness whereof we have hereunto set our hands and seals this 24th day of March, A. D. 1894.

WILLIAM J. THOMPSON. [SEAL.]
ELLEN W. THOMPSON. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. M. BROWN.
DANIEL SINCLAIR.

UNITED STATES,
District of Alaska, } ss:

This certifies that on this 24th day of March, A. D. 1894, before me, the undersigned county clerk in and for the said district, personally appeared the within-named William J. Thompson and Ellen W. Thompson, his wife, who is known to me to be the
59 identical person described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

And that Ellen W. Thompson, wife of the said William J. Thompson, on an examination made by me separate and apart from her said husband, acknowledged to me that she executed the same freely

and voluntarily and without fear, coersion, or compulsion from any one.

In testimony whereof I have hereunto set my hand and seal the day and year last above written.

[SEAL.] J. M. BROWN,
County Cler- and Clerk of the Superior Court.

(Endorsed:) Deed. Wm. J. Thompson and Ellen W. Thompson to Ohlin H. Adsit.

DISTRICT OF ALASKA, }
Juneau Recording District, } ss:

The within instrument was filed for record at 11 o'clock a. m., April 4th, 1894, and was duly recorded in Book 10, on page 13, of the records of said district.

H. W. MELLEN,
District Recorder.

Plaintiff's Exhibit No. 2.

60 JOHN OLDS, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by JOHN G. HEID:

Q. What is your name and where do you reside?
A. John Olds, and I reside at Juneau.
Q. How long have you resided at Juneau?
A. Since December, 1880.
Q. How long in Alaska, I mean?
A. Since December, 1880.
Q. Did you know Joseph Twan?
A. Yes, sir; very well.
Q. Are you familiar with lot 4, in block 4, the corner there known as the New York Store corner?
A. Yes, sir.
Q. Do you know whether Joe Twan, at any time during his residence in Alaska, was in possession of that lot?
A. I know he built that house.
Q. Where? That house standing there now on lot 4, in block 4?
A. Yes; I believe that is the one.
Q. When did he build that house, if you know?
A. I think in the spring of '82.
Q. State if you know whether he occupied that house after building it.
A. Yes; he did.
Q. How long, if you can remember?
A. Well, I think he ran that house as a dance-house until '83 or '4.
Q. Do you know whether he was in possession of that house and lot after that time?

61 A. Well, I don't know when he did get out of it; of course I don't remember, but I think he was in possession until he sold it.

Q. To whom?

A. Well, I believe he sold to that mercantile and packing company.

Q. Do you know if any one occupied that house after he quit running it as a dance-house?

A. They had what was known as the Palace theatre in there, run by Hart and a man by the name of Moore, in '86 and the fall of '85.

Q. Do you know whether it was under a lease from Twan?

A. Well, no; I don't positively; the records ought to show that.

Q. Who were the parties who ran the Palace theatre?

A. I think Jack Moore and Hart; I think they ran it in the fall of '85. I was in San Francisco that winter, and when I got back they had a show there—in the spring of '86.

Q. Twan was in possession of that house until he sold to the Alaska Mercantile and Packing Company?

A. So far as I know.

Q. You have been a constant resident of Juneau, Alaska, since coming here?

A. Yes; that is, I have resided in Juneau and in the basin.

Q. This was your home?

A. This was my home; yes, sir.

Q. You were familiar with matters generally in Juneau during these years?

A. Yes; I ran a large place here and was pretty posted at that time.

62 Q. Was there any other house on that lot except the one that we speak of or that you speak of?

A. No; not that I know of; of course, that house has been enlarged a good deal since that time—built onto the sides and back of it.

Cross-examination by JOHN TRUMBULL:

Q. Do you know who has been in possession of that building for the last four or five years?

A. I guess different parties.

Q. Who are they?

A. Kaufman Brothers were in possession and had a store there, and since then I don't know what the parties' names are.

Q. Do you know whether Kaufman Brothers were in there as tenants or were claiming the ownership?

A. They were in there as tenants, I understood.

Q. You don't know, however, of your own knowledge?

A. I think I went down and introduced them to Mr. Malony and asked him about that house. Kaufman at that time was stopping at our hotel and wanted a place to start a business, and I think I introduced them to Mr. Malony for the purpose of seeing if they could rent that house.

Q. He afterwards entered into possession of it, did he?
A. Yes; I suppose so.
Q. Do you know who enlarged those premises?
A. Well, no; I don't.

Redirect examination:

Q. Do you know when, about, it was you took Mr. Kaufman down and introduced Mr. Malony—before or after '85?
A. Long after '85. I could tell by looking at our register
63 at the hotel.
Q. How far back?
A. I think about in '92 or '3.

Recross-examination:

Q. Do you know who is in possession now?
A. I don't know their names; the tailor is one party.
Q. Is he in there as a tenant of Mr. Malony's?
A. I don't know who he is tenant of; I never inquired into that.

64 EDWARD JAMES, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by JOHN G. HEID:

Q. What is your name and where do you reside?
A. Ed. James; Juneau, Alaska.
Q. How long have you resided in Juneau, Alaska?
A. I think it was in February, '82, I came here first.
Q. Do you know Joe Twan?
A. Yes, sir.
Q. Do you know where lot 4, in block 4, is—the New York Store corner?
A. Yes, sir.
Q. On what corner is it?
A. Franklin and Second streets.
Q. Please state, if you know, whether Joe Twan entered into the possession of that lot, and when, if you know.
A. No; I don't. Joe Twan—let me see—no; I don't know how he came by it. He came into the place, I think, in the spring of '82.
Q. What did he do, if anything, on that lot?
A. Well, that house was built in the spring of '82.
Q. By Joe Twan?
A. He had it built.
Q. He entered into the possession of that house after that?
A. He ran a dance-house there a while.
Q. For how many years?
A. He had a show and dance-house; must have been from '82; two or three years—three or four years; something like that.
65 Q. Do you remember or do you know if he ever leased the premises to any one?

A. Leased them?
Q. Yes.
A. No.
Q. Who occupied the premises after Joe Twan quit running the dance-house, if you know?
A. After Joe closed up there? No; I don't remember.
Q. Do you know anything of the Place theatre?
A. Yes. Hart and Moore and those people opened it up, I think, about '85 for a theatre there. I think it was about '85.
Q. State, if you know, whether Joe Twan owned those premises.
A. At that time?
Q. Yes.
A. I think so; yes, sir.
Q. How long did he own the premises, if you know—until what time?
A. I don't know. I guess it must have been until about '89, wasn't it?
Q. Up to what time, if you know?
A. Wasn't that transferred to Van Gasken?
Q. Did he own the premises up to the time he made the transfer?
A. I think he did, so far as I know.

It is here admitted by the defendant that there was a lease from Joseph Twan to the Place Theatre people of the premises in dispute.

Q. I will ask you if you know whether Joe Twan from the time you say he built that building was in possession of the premises up to the time you say he leased to those Place Theatre
66 people.
A. Yes; I am pretty sure of that; it was always known as his place.

(No cross-examination.)

JOHN OLDS, recalled on behalf of the plaintiff, having been first duly sworn, testified as follows:

Q. I will ask you if you know whether Joe Twan, from the time you say he built that house, was in possession of the premises up to the time you say he leased to those Place Theatre people.
A. I always understood he was; I never heard anything to the contrary.
Q. You testified that Mr. Twan was in possession of these premises until he sold to the Alaska Mercantile and Packing Company. I will ask you whether you know of the Alaska Mercantile and Packing Company occupying this building and premises.
A. Yes, sir.
Q. What did they do there?
A. Ran a general merchandise store.
Q. Do you know how long they continued business there?
A. No; I couldn't say; not very long.

Q. A year or two?
A. Yes, sir; a year or two.
Q. When, about, was that, if you remember?
A. I don't remember just when that was; I think about '88 or '89.
Q. Do you know what became of the premises, whether
67 they were occupied after they quit business?
A. I can't hardly recollect what went into it then. Mr. Howard rented it and ran a store there. Old man Howard and another man ran a store there for a couple of years or so, and after he moved out I guess Mr. Kaufman rented it.
Q. Do you know of any other person occupying that building from Joe Twan down to the Place theatre and the Alaska Mercantile and Packing Company?
A. Not that I recollect.
Q. There was a continuous possession between these parties?
A. I don't recollect of any other parties.

Cross-examination:

Q. Mr. Olds, you mentioned the Alaska Mercantile Packing Company. Were you acquainted with the parties who composed that company?
A. I knew Mr. Van Gasken. I got acquainted with him here. I don't know whether there was any other of the people that worked around there that were interested in that company or not; I know he was one of the company.
Q. He represented them in this Territory?
A. Yes, sir; so far as I know.
Q. About what time did they close out their business here?
A. I couldn't say; I don't remember.
Q. State presumably.
A. I think about '88 or '89.
Q. Since that time have they been doing business in this Territory?
A. Not that I know of, unless they fished at Idaho inlet.
68 Q. From that time to the present time have you known of this mercantile company transacting business in this Territory or being represented by any one in this Territory?
A. No; I couldn't say that I do.
Q. You are in the hotel business?
A. Yes, sir.
Q. And during the period you have mentioned you have lived in Juneau?
A. Yes, sir; with the exception of a few months that I have been away; four or five months altogether, probably.
Q. You- business as a hotel-keeper gives you an extensive acquaintance with the people in the Territory?
A. Yes, sir; rather.

EDWARD JAMES, recalled by the plaintiff, *and* testified as follows:

Q. This man, Mr. Howard, also kept that place as a store?
A. Yes, sir; he did.

Q. There was a continuous possession all the way down through these parties?

A. Yes; he had a store there.

(No cross-examination.)

69 JOHN G. HEID, called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Q. You are an attorney-at-law?

A. Yes, sir.

Q. Where do you reside?

A. Juneau.

Q. How long have you lived there?

A. Since 1885.

Q. Have you been engaged in business here during that time?

A. I have.

Q. Are you acquainted with the premises in dispute, lot 4, in block 4, in Juneau?

A. I am.

Q. How long have you been acquainted with that lot?

A. Ever since my arrival here, since April, '85.

Q. Since you have been here, Mr. Heid, what do you know with reference to the possession and occupation of that lot?

A. When I came here Joe Twan was in possession and ran a dance house, my recollection is, that fall, and then he made a lease to one Hart the following year, to Sam. Hart and his partner, Moore.

Q. What did Hart and Moore do?

A. Ran a theatre, and then I think Slim Jim bought into it, and William McFee, and that fall he sold out to the Alaska Mercantile Company, and they continued business until the fall of '89 or '90, and when they closed out; that is my recollection, because I went East in '88 and came back in the spring, and they were not
70 doing business then, and afterwards this old man Howard paid rent.

Q. Were you the agent for the Alaska Company?

A. I was afterwards. Mr. Gamel had charge of it at first, and afterwards it was turned over to me.

Q. And then you acted for the Alaska Mercantile and Packing Company?

A. Yes, sir.

Q. How long was Mr. Howard in there; do you know?

A. I cannot remember.

Q. The Alaska Mercantile and Packing Company—they occupied it themselves?

A. Yes, sir; in the neighborhood of nearly two years.

Q. Now, after Howard moved out of the premises who occupied it then?

A. It was vacant then.

Q. How long?

A. Quite awhile; everything went down here.

Q. You acted as agent for it, did you?
A. I was for the Alaska Mercantile Company.
Q. Endeavored to rent it?
A. Yes, sir; tried to sell it for them.
Q. Did you succeed in getting any tenant after Howard?
A. No, sir.
Q. You don't know how long it remained vacant?
A. No; I couldn't say.
Q. You have no recollection of anybody being in it after that time?
A. Not until after this suit was commenced by Mr. Shellhouse; until after Mr. Gamel bought in under that suit.

(No cross-examination.)

71 Counsel for plaintiff, having no further evidence to offer on plaintiff's behalf, rested his case.

Whereupon counsel for defendant moved the court for a nonsuit upon the grounds that the plaintiff has failed to prove the allegations of his complaint, in this, that he has failed to prove that he is the owner by occupancy or possession of an undivided one-half part or interest of the lot described in the complaint, and that he has failed to prove an ouster by the defendant.

Motion overruled by the court; to which ruling counsel for defendant then and there duly excepted.

Whereupon the defendant, in order to maintain the issues upon his behalf, offered the following proof:

72 Counsel for the defendant offered in evidence the deed from the United States marshal of the district of Alaska to A. H. Gamel, dated the 24th day of November, 1891.

Counsel for the plaintiff objected to the introduction of the above deed on the grounds that the same is immaterial, irrelevant, and incompetant.

Objection overruled by the court and deed admitted in evidence, marked Defendant's Exhibit A, and reads as follows:

This indenture made the 24th, day of November 1891, between Orville T. Porter, as United States marshal for the district of Alaska, of the first part, and Alfred H. Gamel of Juneau Alaska, the party of the second part: Whereas by virtue of a writ of execution issued out of and under the seal of the United States district court, for the district of Alaska, tested the 27th, day of July 1891, upon a judgment recovered in said court on the 25th day of July 1891 in favor of Aaron Shellhouse and against William Van Gasken and —— Birmingham, whose full name is unknown, formerly partners under the firm name of the Alaska Mercantile and Packing Company, to the said marshal directed and delivered, commanding him that of the personal property of the said judgment debtors, in his district, he should cause to be made certain monies in said writ specified, and if sufficient personal property, of the said judgment debtors, could not be found, that then he should cause the amount of said judgment to be made of the lands tenements and real property belonging to said judgment debtors, William Van Gasken and ——

Birmingham, whose full name is unknown, as the Alaska Mercantile and Packing Company, on the 27th day of April 1891, or at
73 any time afterwards; and whereas because sufficient personal property of the said judgment debtors could not be found whereof, he, the said marshal, could cause to be made the moneys specified in said writ, he the said marshal, did in obedience to said command levy on, take and seize all the estate, right title and interest, which the said judgment debtors, William Van Gasken and —— Birmingham, whose full name is unknown, as the Alaska Mercantile and Packing Company, so had of, in and to the lands tenements, real estate and premises hereinafter more particularly set forth and described, with the appurtenances, and did on the 31, day of August 1891 sell the said premises at public venue, in front of the court-house in the town of Juneau Alaska, between the hours of nine o'clock in the morning and four o'clock in the afternoon of that day, namely at two o'clock, after having first given notice of the time and place of such sale by advertising the same according to law, at which sale the said premises were struck off and sold to the said party of the second part for the sum of $400.00 the said party of the second part being the highest bidder and that being the highest sum bidden, and the whole price paid for the same; and whereas the said marshal after receiving from said purchaser the said sum of money so bidden as aforesaid, gave to the said party of the second part such certificate as directed by law to be given; and whereas on the 24th day of September 1891, such sale was duly confirmed by said United States district court for Alaska and whereas, sixty days have expired after such confirmation, without any
74 redemption of said premises having been made; now this indenture witnesseth: That Orvill- T. Porter, as United States marshal aforesaid, and party hereto of the first part by virtue of the said writ and in pursuance of the statute in such cases made and provided, for and in consideration of the sum of money above mentioned, to him in hand paid as aforesaid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted bargained sold conveyed and confirmed and by these presents doth grant bargain sell convey and confirm unto the said party of the second part and to his heirs and assigns all the estate right title and interest with the said judgment debtors, the said William Van Gasken and —— Birmingham as the Alaska Mercantile and Packing Company, had on the 27th day of April 1891, or at any time afterwards, or now has of in and to all the following-described premises, situated lying and being in the town of Juneau, in the district of Alaska, to wit: An undivided one-half interest in and to that certain piece or parcel of land situated as aforesaid and marked and designated on the town plat of Juneau Alaska as lot 4 in block 4 the same being situated on the corners of Second and Franklin streets of said Juneau and known as the Alaska Mercantile and Packing Company's premises, together with an undivided one-half interest of in and to all buildings and improvements thereon situated; together with all and singular the tenements hereditaments and ap-

purtenances thereunto belonging, or in anywise appertaining:
75 To have and to hold the said premises, with the appurtenances unto the said party of the second part, his heirs and assigns forever, as fully and absolutely as he, the said marshal aforesaid, can, may or ought to, by virtue of the said writ and the statute in such cases made and provided, grant, bargain, sell release consign convey and confirm the same.

In witness whereof, the said United States marshal the party of the first part to these presents, hath hereunto set his hand and seal the day and year first above written.

ORVILLE T. PORTER, [SEAL.]
U. S. Marshal for the District of Alaska.

Sealed and delivered in the presence of—
A. A. MEYER.
A. K. DELANY.

DISTRICT OF ALASKA, *ss:*

On this 24th day of November 1891, before me, N. R. Peckinpaugh, clerk of the United States district court, personally appeared Orville T. Porter, United States marshal for the district of Alaska, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he, as such marshal aforesaid, executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

N. R. PECKINPAUGH,
[SEAL.] *Clerk of the U. S. District Court.*

(Endorsed:) U. S. dist. court. U. S. marshal to Alfred H. Gamel. Marshal's deed.

DISTRICT OF ALASKA, *Juneau Recording Dist.*, } *ss:*

76 The within instrument was filed for record at 12 o'clock m. December 19th, 1891, and duly recorded in Book N, on page 711, of the records of said district.

W. R. HOYT,
District Recorder.

Counsel for defendant offered in evidence a deed dated the 20th day of January, 1894, from A. H. Gamel to Emery Valentine.

The above deed was admitted in evidence by the court over plaintiff's objection, marked Defendant's Exhibit B, and reads as follows:

This indenture made this 20th day of January in the year of our Lord one thousand eight hundred and ninety-four between A. H. Gamel and Bettie Gamel, his wife of the town of Everett in the State of Washington, the parties of the first part and Emery Valentine of the town of Juneau Alaska, the party of the second part. Witnesseth: That the said parties of the first part for and in consider-

ation of the sum of ten dollars lawful money of the United States of America to them in hand paid, by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents remise release and forever quitclaim unto the said party of the second part and to his heirs and assigns the following-described tract, lot or parcel of land situated lying and being in the town of Juneau district of Alaska, particularly bounded and described
77 as follows to wit: An undivided one-half (½) interest in and to lot No. four (4) in block No. four (4) in said town of Juneau, according to the plat thereof together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders rents issues and profits thereof.

To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part and to his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

A. H. GAMEL, [SEAL.]
By his att'y-in-fact, J. F. MALONY.
BETTIE GAMEL, [SEAL.]
By her att'y-in-fact, J. F. MALONY.

Signed, sealed, and delivered in the presence of—
F. D. NOWELL.
FRANK C. HAMMOND.

UNITED STATES, }
District of Alaska, } ss:

This is to certify that on this 20th day of January, A. D. 1894, before me, F. D. Nowell, a notary public in and for the dist. of Alaska, duly commissioned and sworn, personally came J. F. Malony, as att'y-in-fact of A. H. Gamel and Bettie Gamel, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he as such att'y-in-fact signed and sealed the same as his free and voluntary act
78 and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

FRED'K D. NOWELL,
[SEAL.] *Notary Public in and for the Dist. of Alaska.*

(Endorsed:) Quitclaim deed from A. H. Gamel and Bettie Gamel to Emery Valentine. Defendant's Exhibit B.

DISTRICT OF ALASKA, }
Juneau Recording District, } ss:

The within instrument was filed for record at 9 o'clock a. m. January 22, 1894, and was duly recorded in Book O, on page 756, of the records of said district.

H. W. MELLEN,
District Recorder.

Counsel for defendant offered in evidence a deed dated January 20th, 1894, from Emery Valentine to J. F. Malony.

The above deed was admitted in evidence by the court, over the objection of plaintiff, and marked Defendant's Exhibit C, and reads as follows:

This indenture made this 20th day of January in the year of our Lord one thousand eight hundred and ninety-four between Emery Valentine of the town of Juneau Alaska, the party of the first part and J. F. Malony, of the same place, the party of the second part, witnesseth: that the said party of the first part for and in
79 consideration of the sum of ten dollars *first part for and in consideration of the sum of ten dollars* lawful money of the United States of America to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents remise release and forever quitclaim unto the said party of the second part, and to his heirs and assigns the following tract lot or parcel of land situated lying and being in the town of Juneau district of Alaska, particularly bounded and described as follows to wit: An undivided one-half (½) interest in and to lot No. four (4) in block No. four (4) in said town of Juneau, according to the plat thereof.

Together with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents issues and profits thereof.

To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part and to his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

EMERY VALENTINE. [SEAL.]

Signed, sealed, and delivered in the presence of—
F. D. NOWELL.
FRANK C. HAMMOND.

UNITED STATES,
District of Alaska, } ss:

This is to certify that on this 20th day of January, A. D. 1894, before me, F. D. Nowell, a notary public in and for the dis-
80 trict of Alaska, duly commissioned and sworn, personally came Emery Valentine, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

FRED'K D. NOWELL,
Notary Public in and for the District of Alaska.

(Endorsed:) Quitclaim deed from Emery Valentine to J. F. Malony. Defendant's Exhibit C.

DISTRICT OF ALASKA, } ss.:
Juneau Recording District, }

The within instrument was filed for record at 9.05 o'clock a. m. January 22, 1894, and duly recorded in Book O, on page 758, of the records of said district.

H. W. MELLEN,
District Recorder.

Counsel for defendant offered in evidence a power of attorney from A. H. Gamel and wife to J. F. Malony.

The above instrument was admitted in evidence over the objection of plaintiff, marked Defendant's Exhibit D, and reads as follows:

Know all men by these presents, that we, A. H. Gamel and his wife Bettie Gamel and Bettie Gamel and her husband A. H. Gamel,
81 both of Everett, Snohomish county Washington, parties of the first part, have made constituted and appointed and by these presents do make, constitute and appoint John F. Malony of Juneau Alaska our true and lawful attorney for us and in our name place and stead to grant bargain and sell bond and convey any and all property owned by us or either of us, in the district of Alaska and to make in our names and for our use and benefit the proper instruments in writing and deeds with the usual covenants. And to collect all debts and rents now due us or either of us and all debts and rents that are to become due and owing to us in the district of Alaska; and to sue for all such moneys that may become due and owing to us or either of us.

Giving and granting to our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as we might or could do if personally present. Hereby ratifying and confirming all that our said attorney shall lawfully do, or cause to be done by virtue of these presents.

In witness whereof we have hereunto set our hands and seals the second day of April in the year of our Lord one thousand eight hundred and ninety-two.

A. H. GAMEL. [SEAL.]
BETTIE GAMEL. [SEAL.]

Signed, sealed, and delivered in the presence of—
G. A. CLUM.
MAXWELL STEVENSON.

STATE OF WASHINGTON, } ss.:
County of Snohomish, }

82 This is to certify that on this second day of April, A. D. 1892, before me, G. A. Clum, a notary public in and for the State of Washington, duly commissioned and sworn, personally came A. H. Gamel and Nettie Gamel, to me known to be the indi-

viduals described in and who executed the within instrument, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned; and the said Bettie Gamel, wife of said A. H. Gamel, upon an examination by me separate and apart from her said husband, when the contents of said instrument were by me fully made known to her and she was fully appraised of her rights and the effect of signing the within instrument, did freely and voluntarily, separate and apart from her said husband, acknowledged the same, acknowledging that she did voluntarily, of her own free will and with- the fear of or coercion from her husband, execute the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

G. A. CLUM,

[SEAL.] *Notary Public in and for Washington, Residing at Everett.*

(Endorsed:) Special power of attorney from A. H. Gamel and Bettie Gamel to John F. Malony. Defendant's Exhibit D.

DISTRICT OF ALASKA, } ss:
Juneau Recording District, }

The within instrument was filed for record at 11 o'clock a. m. April 22, 1892, and recorded in Book H, page 218.

W. R. HOYT.

83 JOHN F. MALONY, called on behalf of the defendant, having been first duly sworn, testified as follows:

Examined by JOHN TRUMBULL:

Q. Your name is John F. Malony?
A. Yes, sir.
Q. You live in Juneau?
A. I do.
Q. How long have you lived in Juneau?
A. Since '85.
Q. What is your business?
A. Attorney.
Q. Are you acquainted with this property in dispute?
A. I am.
Q. State, Mr. Malony, whether or not you are in the possession of that property.
A. I am.
Q. Or an interest in that property?
A. I am.
Q. How long have you been in possession of that interest?
A. Since August 31st, 1891; at that time I got a certificate from the marshal of the sale, sixty days before making the deed.

Q. State whether or not since that time you have been in the possession there, either by yourself or your tenant.

A. Continuous possession from that time to the present.

Q. During that time has your possession been disputed by any one?

A. It has not.

84 Q. Have you made any improvements on these premises?

A. I have.

Q. What do they consist of?

A. A new addition on one side, and then the building burned practically down and was rebuilt.

Q. Were you acquainted with the corporation known as the Alaska Packing Company?

A. I was acquainted with the Alaska Mercantile and Packing Company, but never knew they were a corporation. They have no articles on file.

Q. Assuming there was such a corporation, who was it represented by here?

A. William Van Gasken.

Q. Were you acquainted with him?

A. Yes, sir.

Q. What was their business here?

A. Mercantile business; in that for a time, and then in a fishing business at Idaho inlet.

Q. How long were they in business here?

A. A little over a year.

Q. Do you remember when they went away?

A. I think in the latter part of '87 or along towards '88.

Q. Do you know where they went to?

A. From here?

Q. Yes.

A. They left here and went below; to Tacoma, I think.

Q. You stated that you are an attorney-at-law?

85 A. I am.

Q. Your practice extends over the Territory considerably?

A. Yes, sir; to quite an extent.

Q. State whether or not this corporation has any representative in this Territory.

A. Not that I know of; I never knew of it.

Q. Mr. Malony, do you know if this corporation has been doing any business here since the time it closed out?

A. No; it has not.

Q. My. Malony, do you know of a man by the name of W. J. Thompson?

A. I do not.

Q. Do you know of any such man ever living in Juneau?

A. Not to my knowledge.

Q. How many years have you lived in Juneau?

A. Since October, '85.

Q. Well, do you know of any man by the name of Thompson ever living in that property?

A. I know there was not; not since '85, at least.

Cross-examination:

Q. Mr. Malony, you say you have been in possession of the premises since when?

A. August 31st, '91.

Q. You have never been disturbed during that time?

A. No, sir.

Q. Isn't it a fact that when you purchased the property you were notified that Birmingham and Van Gasken didn't own the property?

A. Mr. Gamel or Mr. Heid.

86 Q. Were you present at the sale?

A. Yes, sir.

Q. Wasn't that notice given publicly?

A. Mr. Heid gave some notice to that effect.

Q. You heard it?

A. Yes, sir.

Q. You haven't been in possession of this property yourself; you have held it by tenants?

A. By tenants; yes, sir.

Q. You have given these tenants an indemnifying bond?

A. I did Kaufman; he asked me for it.

Q. He didn't dispute your title?

A. No, sir; I indemnified him. Mr. Heid made some threat against him.

Q. You indemnified other tenants, didn't you?

A. No, sir; I did not. Mr. Kaufman asked me to protect him from any trouble.

Q. You were the attorney for the plaintiff in the execution under which this property was sold?

A. Mr. Shellhouse; yes, sir.

Q. Your claim to the property, Mr. Malony, is based on the purchase under that execution sale?

Counsel for defendant object to the above question as not proper cross-examination and calling for an opinion of the witness. Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

A. Not wholly; that in part, and by more than five years

87 undisputed possession.

Q. Prior to this suit?

A. Yes, sir; the suit was commenced—I don't remember exactly the date. I went into possession August 31st, '91.

Q. These improvements you speak of, were they made since this suit was commenced?

A. None of them except the last repairs, when the building was burned down.

Q. That was the principal part of the repairs?

A. No, sir.

Q. How much did it take to repair it after the fire?

A. I think perhaps in the neighborhood of $250 or $260.

Q. That was done since this suit was commenced?
A. Yes, sir.
Q. What is the amount of the other repairs on there?
A. I should say five or six hundred dollars; maybe more.
Q. Well, how much more?
A. It would hardly exceed $700.
Q. What does the place rent for?
A. Well, at the present time, one room for $10 and one for $15, and the main hall did rent for $50, but I didn't get much of the rent out of it.
Q. How much rent have you had since you claimed it?
A. That would be difficult to say.
Q. Have you got enough rent to pay for the improvements?
A. No; we have not—not at all.
Q. Was it vacant any time after you claim to have purchased it?
A. Yes, sir.
Q. How long did it stand vacant?
A. It was vacant for a considerable time, until the Kauf-
88 man Brothers went in there.
Q. How long did the Kaufman Brothers occupy it?
A. Let me see. A year and a half, I think.
Q. How much rent did they pay you a month?
A. Thirty dollars.
Q. How long has the mil-inary store been in there?
A. I guess it must have been in there six or eight months.
Q. How much rent do they pay a month?
A. Ten dollars.
Q. You can't give any estimate at all as to what the rent amounts to?
A. No; I really can't; it covers so long a period, and then there were parties in there that didn't pay anything at all.

89 O. H. ADSIT, called on behalf of the defendant, having been first duly sworn, testified as follows:

Examined by JOHN TRUMBULL:

Q. You are the grantee in a deed made by J. W. Thompson and wife, are you not?
A. Yes, sir.
Q. You are acquainted with Mr. Thompson?
A. No, sir.
Q. Ever see him?
A. No, sir.
Q. Never seen him?
A. No, sir.
Q. Ever speak with him?
A. No, sir.
Q. Do you know where the man lives?
A. I think he lives at Gilman, near Seattle. The purchase was made through Mr. Hale, of the Tacoma Grocery Company, and this

Mr. Thompson was formerly president of the West Coast Grocery Company.

Q. In Tacoma?
A. Yes, sir.
Q. Mr. Thompson lives in Tacoma, then?
A. I guess he did at that time.
Q. Do you know if he ever lived in this Territory?
A. I do not.
Q. Don't you know that Thompson lives in Tacoma now?
A. No; I don't.
Q. You are not personally acquainted with him?
A. No, sir.

90 Cross-examination:

Q. You were going to state who arranged this trade for you.
A. Mr. Hale, of the Tacoma Grocery Company.
Q. He procured the deed from Mr. Thompson for you?
A. Yes, sir.

JOHN OLDS, called on behalf of the defendant, having been first duly sworn, testified as follows:

Q. Do you know of a man by the name of W. J. Thompson ever lived in Juneau, on this place?
A. Well, no; I don't know as I do. I know of several Thompsons.
Q. Did you ever know of any man by the name of Thompson that lived there?
A. No.

It is here admitted by the plaintiff that the Thompson named as the grantor in the deed from W. J. Thompson and wife to plaintiff never lived in the district of Alaska.

Whereupon the defendant, having no further proof to offer in his behalf, rested his case.

91 Whereupon the plaintiff offered the following proof in rebuttal:

Counsel for plaintiff offered in evidence the record in the case of Aaron Shellhouse against William Van Gasken and —— Birmingham, being case number 285 in the United States district court for the district of Alaska.

Counsel for defendant objected to the introduction of the said record for the reason that the same is incompetant, immaterial, and irrelevant.

Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

The record being admitted in evidence read as follows, to wit:

(*The Complaint.*)

In the United States District Court for the District of Alaska.

AARON SHELLHOUSE, Plaintiff,
vs.
WILLIAM VAN GASKEN and —— BIRMINGHAM, Whose Full Name is Unknown, Partners under the Firm Name of the Alaska Mercantile and Packing Company, Defendants.

For complaint in the above-entitled action the plaintiff complains and alleges that on or about the 1st day of May, 1889, the
92 plaintiff herein entered into an agreement with defendants by which plaintiff was to pack salmon for defendants at an agreed-upon rate of $3.00 per barrel.

That in accordance with said agreement this plaintiff did so pack and ship by defendants' instructions 133 barrels of salmon.

That afterwards, to wit, about the 15th day of July, 1889, this plaintiff advanced for freight on salt for the use and benefit of said defendants the sum of $76.75.

That afterwards, to wit, on or about the 20 day of July, 1889, the plaintiff herein performed labor and services for said defendants in transporting said salt from Idaho inlet to Bartletts bay, and that the same was reasonable worth the sum of $25.00.

That the defendants have not paid said sums nor any part thereof save and except the sum of $150.00.

That there is now due and owing this plaintiff from defendants the sum of $350.75.

Wherefore plaintiff demands judgment against said defendants in the sum of $350.75, with interest thereon from the 1st day of September, 1889, to the date hereof, with costs of action.

J. F. MALONY, *Pl'ff's Att'y.*

UNITED STATES, *Dist. of Alaska,* } *ss:*

Aaron Shellhouse, being duly sworn, says: I am the plaintiff in the above-entitled action. I have heard read the foregoing complaint and know the contents thereof, and that the same is true, as I verily believe.

AARON SHELLHOUSE.

Subscribed and sworn to before me this 10th day of April,
93 1891.

J. F. MALONY,
Notary Public. [SEAL.]

(Endorsed:) In the U. S. dist. court for the dist. of Alaska. Aaron Shellhouse, pl'ff, *vs.* The Alaska Mercantile and Packing Company. Complaint. Filed Apr. 18, 1891. N. R. Peckinpaugh. J. F. Malony, pl'ff's att'y.

(*Default.*)

In the United States District Court for the District of Alaska.

AARON SHELLHOUSE
vs.
WILLIAM VAN GASKEN and —— BIRMINGHAM, Whose Full Name is Unknown, Formerly Partners under the Firm Name of the Alaska Mercantile and Packing Company. } No. 285.

In this action the defendant-, William Van Gasken and —— Birmingham, having been regularly served with process by publication and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendants, William Van Gasken and —— Birmingham, in the premises, is hereby duly entered according to law.

Attest my hand and the seal of said court at Sitka, Alaska, the 13th day of July, 1891.

N. R. PECKINPAUGH, *Clerk.*

(Endorsed:) No. 285. In the U. S. dist. court, dist. of Alaska. Aaron Shellhouse *vs.* Alaska Mercantile and Packing Co. Entry of default. Filed July 13th, 1891. N. R. Peckinpaugh, clerk.

(*Judgment.*)

In the U. S. Dist. Court for Alaska.

AARON SHELLHOUSE, Pl'ff,
vs.
WILLIAM VAN GASKEN and —— BIRMINGHAM, Whose Full Name is Unknown, Formerly Partners under the Firm Name of the Alaska Mercantile and Packing Company, Defendant-.

94 In this action the defendant- having been regularly served with process and having failed to appear and answer the plaintiff's complaint filed herein and the legal time for answering having expired and no answer or demurred having been filed, the default of said defendants in the premises having been duly entered according to law, now, at this day, on application of John F. Malony, attorney for said plaintiff, it is hereby ordered that judgment be entered herein against said defendants in accordance with the prayer of said plaintiff's complaint on file herein. Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that Aaron Shellhouse, plaintiff, do have and recover of and from said defendants, William Van Gasken and —— Birming*house*, partners or formerly partners as the Alaska Mercantile and Packing Company, the sum of three hundred and fifty and $\frac{75}{100}$ dollars, with interest thereon, at the rate of 8 per cent. per annum, from Septem-

ber 1st, 1889, until paid, together with said plaintiff's costs and disbursements, amounting to thirty-four and $\frac{70}{100}$ dollars. Judgment rendered July 25th, 1891.

(Endorsed:) No. 285. In the U. S. dist. court, dist. of Alaska. Aaron Shellhouse *vs.* Alaska Mercantile & Packing Company. Judgment. Filed July 25, '91. N. R. Peckinpaugh, clerk.

(*Execution.*)

In the District Court of the United States for the District of Alaska.

AARON SHELLHOUSE
vs.
95 WILLIAM VAN GASKEN and —— BIRMINGHAM, Whose Full Name is Unknown, Formerly Partners under the Firm Name — the Alaska Mercantile and Packing Company.

The President of the United States to the marshal of the district of Alaska or to his deputy, Greeting:

Whereas, on July 25th, 1891, by consideration of the above-entitled court, the plaintiff recovered judgment against the defendants for the sum of three hundred and fifty dollars and seventy-five cents, damages, and thirty-four dollars and seventy cents, costs and disbursements, which judgment was enrolled and docketed in the office of the clerk of said court on said date: Now, therefore, you are hereby commanded that out of the personal property of said defendants in your district, or if such cannot be found, then out of the real property of said defendants in your district on or after said date, you satisfy the sum of three hundred and eighty-five dollars and forty-five cents, now due on said judgment, with interest thereon from date of said judgment at the rate of 8 per centum per annum from September 1st, 1889, and also the costs of and upon this writ and the accruing costs, and that you make due return of the same.

Witness the honorable judge of said district court and the seal of said court affixed at Sitka, in said district, this 27th July, 1891.

N. R. PECKINPAUGH, *Clerk.*

(Endorsed:) In the district court of the United States for the district of Alaska. Aaron Shellhouse *vs.* Alaska M. and P. Company. Execution. Returned and filed Sept. 8, 1891. N. R. Peckinpaugh, clerk.

(Attached thereto.)

DISTRICT OF ALASKA, *ss:*

96 I hereby certify that the within writ of execution came into my hands for service on the 27th day of July, 1891, and no personal property of the defendant company was found by me after due and diligent search, and on the 29th day of July, 1891, by virtue of said writ, I levied upon an undivided one-half

interest in lot 4, in block 4, as marked and designated on the town plat of Juneau, Alaska, the same being situated in the said town of Juneau, and such property was pointed out to me as being the property of the defendant company by the plaintiff in said action; and after giving due and legal notice of the time, place, and manner of sale of said property by publishing the same in the Juneau City Mining Record, a weekly newspaper published in said Juneau, for four consecutive weeks and posting notices of said sale in three conspicuous places in said town of Juneau, Alaska, I did, on the 31st day of August, 1891, in pursuance of said notice of sale, sell said lot of land and building thereon situated to the highest and best bidder, the said sale being at 2 o'clock of the 31st day of August, 1891, and in front of the court-house door in Juneau, Alaska, and said property was then and there sold to Alfred H. Gamel for the sum of four hundred dollars, that being the highest and best sum bid, the said sum of money being then and there paid to the attorney for plaintiff, which is evidenced by his receipt hereto attached, all costs being paid, as evidenced by receipts hereto attached, and all of the attached receipts are hereby made a part of this return.

ORVILLE T. PORTER,
U. S. Marshal for Alaska.
MAX ENDELMAN,
Deputy U. S. Marshal.

(Also attached thereto.)

To Orville T. Porter, United States marshal for the district of Alaska.

97 SIR: You are hereby notified that the undivided one-half part or interest of, in, and to lot numbered four (4), in block numbered four (4), together with an undivided one-half part or interest of, in, and to the building thereon situated in the town of Juneau, Alaska, levied upon by you under and by virtue of an execution issued out of the United States district court for the district of Alaska, dated the 27th day of July, 1891, in a certain action wherein Aaron Shellhouse, as plaintiff, recovered judgment against William Van Gasken and William Birmingham, is not the property of the said Van Gasken and Birmingham, but is the property of the Alaska Mercantile and Packing Company, a corporation organized and existing under and by virtue of the laws of the Territory, now State of Washington, having its principal office in the city of Tacoma, in said State; that said described property is now and was the property of said company before the commencement of said action. You are further notified not to sell or offer for sale any right, title, or interest of, in, and to said property belonging to said Alaska Mercantile & Packing Company under said levy.

Dated Juneau, Alaska, August 20th, 1891.

JOHN G. HEID,
Attorney for Alaska Mercantile and Packing Company.

(*Writ of Attachment.*)

In the United States District Court for the District of Alaska.

The President of the United States of America to the marshal of the district of Alaska or to his deputy, Greeting:

Whereas Aaron Shellhouse hath complained that William Van Gasken and —— Birmingham, under the firm name of the Alaska Mercantile and Packing Co., — justly indebted to Aaron
98 Shellhouse to the amount of three hundred and fifty (350) dollars and seventy-five cents, and the necessary affidavit and undertaking herein having been filed as required by law, we therefore command you that you attach and safely keep so much of the estate, real or personal, of said The Alaska Mercantile and Packing Company to be found in your district as shall be of value sufficient to satisfy the said debt and the costs and disbursements of the said plaintiff herein, and of this writ make due service and return.

Witness the judge of said district court and the seal thereof, affixed at Sitka, in said district, this 27th day of April, 1891.

N. R. PECKINPAUGH, *Clerk.*

(Endorsed:) No. 285. District court of the United States, district of Alaska. Aaron Shellhouse *vs.* The Alaska Mercantile and Packing Company. Attachment writ. Filed May 15, 1891. N. R. Peckinpaugh, clerk.

(Also endorsed.)

UNITED STATES, *Dist. of Alaska,* } *ss:*

I hereby certify that I received the within attachment on the 28th day of April, 1891, and served the same on the 29th day of April, 1891, by levying on all the right, title, and interest of William Van Gasken in and to lot No. 4, in block No. 4, with the buildings thereon, by leaving a copy with the occupant thereof and posting a copy thereon.

ORVILLE T. PORTER,
U. S. Marshal,
By MAX ENDELMAN,
Deputy U. S. Marshal.

Counsel for the plaintiff offered in evidence two notices with the acceptance of service by the U. S. marshal.

Counsel for the defendant objected to the introduction in evidence of the said notices for the reason that same are immaterial, irrelevant, and incompetent.

99 Objection overruled by the court; to which ruling counsel for defendant then and there duly excepted.

The notices, being admitted in evidence by the court, were marked Plaintiff's Exhibits No. 4 and No. 5, and are as follows, respectively:

(PLAINTIFF'S EXHIBIT No. 4.)

JUNEAU, ALASKA, *June 18th*, 1891.

Orville T. Porter, Esq., U. S. marshal for the district of Alaska:

You are hereby notified that the property attached by you in the case of Aaron Shellhouse, plaintiff, against William Van Gasken and — Birmingham, whose full name is unknown, formerly partners under the firm name of the Alaska Mercantile & Packing Company, defendants, is not the property of the said Van Gasken & Birmingham, but the said property attached by you, to wit, lot No. 4, in block No. 4, in the town of Juneau, Alaska, is the property of the Alaska Mercantile & Packing Company, a corporation organized and existing under the laws of the State of Washington, formerly Territory of Washington, and you are hereby requested to release the said attachment and notified not to dispose of or meddle with the said property.

Respectfully,

JOHN G. HEID,
Att'y for the Alaska Mercantile and Packing Company.

Due and personal service of the original copy of the above notice is hereby admitted at Juneau, Alaska, this 18th day of June, 1891.

ORVILLE T. PORTER,
U. S. Marshal,
By A. A. MEYER,
Deputy Marshal.

100

(PLAINTIFF'S EXHIBIT No. 5.)

To Orville T. Porter, Esq., United States marshal for the district of Alaska.

SIR: You are hereby notified that the undivided one-half part or interest of, in, and to lot numbered four (4), in block numbered four (4), together with an undivided one-half part or interest of, in, and to the building thereon situated, in the town of Juneau, Alaska, levied upon by you, under and by virtue of an execution issued out of the United States district court for the district of Alaska, dated the 27th day of July, 1891, in a certain action wherein Aaron Shellhouse, as plaintiff, recovered judgment against William Van Gasken and William Birmingham, is not the property of the said Van Gasken and Birmingham, but is the property of the Alaska Mercantile & Packing Company, a corporation organized and existing under and by virtue of the laws of the Territory, now State of Washington, having its principal office in the city of Tacoma, in said State; that said described property is now and was the property of said company before the commencement of said action. You are further notified not to sell or offer for sale any right, title, or interest of, in, and to said property belonging to said Alaska Mercantile & Packing Company under said levy.

Dated Juneau, Alaska, August 20th, 1891.

JOHN G. HEID,
Attorney for Alaska Mercantile and Packing Company.

101 Due and legal service of a duplicate copy of the above notice is hereby acknowledged, at Juneau, Alaska, this 20th day of August, 1891.

ORVILLE T. PORTER,
U. S. Marshal,
By MAX ENDELMAN,
Deputy U. S. Marshal.

Counsel for plaintiff offered in evidence an advertisement in a copy of the Alaska Free Press of date Saturday, May 12th, 1888, showing who the manager is for Alaska.

The above, being admitted without objection, was marked Plaintiff's Exhibit No. 6, and reads as follows:

Wm. Van Gasken, manager in Alaska for the Alaska Mercantile & Packing Co., wholesale and retail dealers in general merchandise and miners' supplies. We are last in the field, but we have come to stay. Can be found at the old Palace theatre, on 2nd street opposite Reed's. Outfitting miners & prospectors a specialty. We carry Armour's hams and bacon.

Counsel for the plaintiff offered in evidence an advertisement in a copy of the Juneau City Mining Record of date December 13th, 1888.

The above, being admitted in evidence without objection, was marked Plaintiff's Exhibit No. 7, and reads as follows:

Alaska Mercantile and Packing Company, Wm. Van Gasken, manager in Alaska, wholesale and retail dealers in general
102 merchandise. Complete stock of choice family groceries, boots, shoes, clothing, and hardware. Outfitting miners and prospectors a specialty. We carry Armour's hamd and bacon. We are last in the field, but we have come to stay. Can be found at the old Palace theatre, on Second street opposite Reed's.

Counsel for the plaintiff, having no further evidence to offer in rebuttal, rested his case.

The foregoing was all the evidence produced upon said trial, and the defendant, John F. Malony, contents that upon the whole evidence the plaintiff has failed to prove a cause of suit against this defendant for the reasons set out in defendant's assignment of errors filed in this cause.

The court, having taken the matter under advisement, found for the plaintiff.

MALONY & WINN,
JOHN R. WINN,
Attorneys for Defendant.

Service of a true and correct copy of the foregoing bill of exceptions is this 23rd day of December, A. D. 1897, duly admitted.

JOHN G. HEID,
Of Counsel — Attorneys for Plaintiff.

103 UNITED STATES, } ss:
District of Alaska, }

The foregoing bill of exception- is correct and in accordance with the proceedings had in the trial of this cause.

JOHN G. HEID,
Of Counsel & Attorney for Plaintiff.
MALONY & WINN &
JOHN R. WINN,
Attorneys for Defendant.

The foregoing bill of exceptions- is hereby settled and allowed this 4th day of January, 1898.

CHARLES S. JOHNSON, *Judge.*

(Endorsed:) No. 508. O. H. Adsit *vs.* John F. Malony. Bill of exceptions. Filed Jan. 4, 1898. Albert D. Elliot, clerk.

104 And afterwards, to wit, on March 25, 1898, def't filed his bond on appeal, which is in words & figures following, to wit:

In the United States District Court in and for the District of Alaska.

O. H. ADSIT, Plaintiff and Respondent, }
vs.
JOHN F. MALONY, Defendant and Appellant. }

Know all men by these presents that we, John F. Malony and B. M. Behrends and Emery Valentine, of the town of Juneau, district of Alaska, are held and firmly bound unto the above-named O. H. Adsit in the sum of one thousand dollars ($1,000.00), to be paid to the said O. H. Adsit; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of M'ch, 1898.

Whereas the above-named John F. Malony is prosecuting an appeal in the Supreme Court of the United States in the above-entitled action to reverse the decree rendered in the above-entitled suit by the judge of the United States district court in and for the district of Alaska:

Now, therefore, the condition of this obligation is such that if the above-named John F. Maloney shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

105 JOHN F. MALONY.
B. M. BEHRENDS.
EMERY VALENTINE.

Approved March 25, 1898.
CHARLES S. JOHNSON, *Judge.*

(Endorsed:) Filed March 25, 1898. Albert D. Elliot, clerk.

106 And afterwards, on said date, the following citation was issued out of said court in said cause:

In the United States District Court in and for the District of Alaska.

O. H. ADSIT, Plaintiff and Respondent,
vs.
JOHN F. MALONY, Defendant and Appellant.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to O. H. Adsit, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October, 1898, pursuant to an appeal filed in the clerk's office of the United States district court in and for the district of Alaska, at Sitka, wherein John F. Malony is appellant and O. H. Adsit respondent, to show cause, if any be, why the judgment in said appeal and writ of error mentioned should not be corrected and speedy justice should not be done to the appellant on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 25th day of March, in the year of our Lord as written, one thousand eight hundred and ninety-eight.

CHARLES S. JOHNSON,
Judge of the United States District Court in and for the Dist. of Al.

107 And afterwards, to wit, on said date, the following further proceedings were had and appear of record in said cause, to wit:

In the United States District Court in and for the District of Alaska.

O. H. ADSIT, Plaintiff and Respondent,
vs.
JOHN F. MALONY, Defendant and Appellant. } No. 508.

It appearing to the court that the clerk has prepared a transcript of the proceedings, orders, testimony, and affidavits in the above-entitled cause, and notice of appeal having been given and necessary citation issued to O. H. Adsit and bond filed providing for the payment of costs of appeal as required by law:

Now, therefore, the clerk of the above-entitled cause is hereby ordered to certify the record of said cause and all the papers — documents connected therewith, after attaching the necessary clerk's certificate thereto, to the Supreme Court of the United States, at Washington, D. C., and that the same be forwarded immediately to be filed with the clerk of the Supreme Court of the United States, at Washington, D. C.

CHARLES S. JOHNSON, *Judge.*

108 In the United States District Court in and for the District of Alaska.

O. H. ADSIT, Plaintiff and Respondent,
v.
JOHN F. MALONY, Defendant and Appellant.

UNITED STATES,
District of Alaska, } ss:

I, Albert D. Elliot, clerk of the United States district court in and for the district of Alaska, under and by virtue of the foregoing order allowing an appeal in the above-entitled cause to the Supreme Court of the United States and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 107, inclusive, contain a true and complete description of the record and proceedings had in said court in the cause of John F. Malony, defendant and plaintiff in error, against O. H. Adsit, plaintiff and defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at Sitka, in the district of Alaska, this 25 day of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States one hundred and twenty-two.

[Seal United States District Court, Alaska.]

ALBERT D. ELLIOT,
Clerk of the United States District Court
in and for the District of Alaska.

Endorsed on cover: Case No. 16,861. Alaska D. C. U. S. Term No., 288. John F. Malony, appellant, *vs.* O. H. Adsit. Filed April 28th, 1898.

Supreme Court of the United States.

October Term, 1898.

No. 288.

JOHN F. MALONY,

Appellant.

vs.

O. H. ADSIT,

Appellee.

STATEMENT OF THE CASE.

In May, 1896, Adsit filed his complaint against Malony, in the District Court of the United States for the District of Alaska, in which he asked the recovery of the possession of an undivided one-half part or interest in and to the premises, on the corner of Second and Franklin streets, in the town of Juneau, Alaska, better described as Lot 4 in Block 4, according to the plat and survey of the town of Juneau made by J. C. Hanus, adopted in the year 1881, by the citizens of the town, which was formerly known as Rockwell but is now known as Juneau. Rec., p. 1.

Malony demurred to the complaint, and the demurrer was overruled. Rec. p. 3. In his answer (Rec. pp. 4, 5) he denied specifically the averments

of the complaint, and plead, affirmatively, in substance as follows: That on or about the 24th day of November, 1891, Alfred H. Gamel was in the quiet and peaceable possession of an undivided one-half interest in the lot described in the complaint: that on January 20, 1894, the said Gamel conveyed and transferred to Malony all his right, title and interest in and to the lot and buildings; that thereupon Gamel delivered the possession of the lot and premises to Malony; that the latter ever since that time, by himself and his tenants, has been in the quiet and peaceable possession of the lot, and now is in the quiet and peaceable possession of the same; that Malony and his grantors have been in the quiet and peaceable occupancy of said lot and premises for more than three years; that his estate and interest therein had not expired or ended; and that by reason thereof the plaintiff ought not now be allowed to maintain his action.

Adsit replied to Malony's answer specifically denying all the allegations therein contained, and asking judgment as prayed for in his complaint. Rec. pp. 5, 6.

The case was tried August 20, 1897, and the court made certain findings of fact and conclusions of law. The facts we will summarize as follows:

1. April 19, 1881, Adsit and his grantors entered into actual possession of the property described in the complaint, claiming it in their own right, and they have occupied, used and possessed the property ever since that date, and have erected a building thereon, using and claiming it in their own right

from that date to the time of trial, adversely to all the world and especially as against Malony.

2. That Adsit is the owner of an undivided half interest in Lot No. 4.

3. That Malony, April 29, 1891, without right or title, entered upon the lot and ousted and ejected Adsit and his grantors therefrom, and from that time hitherto has wrongfully withheld the possession thereof from the said plaintiff.

The conclusions of law are substantially as follows:

1. That Adsit is the owner and entitled to the possession of the undivided one-half part of the lot and that Malony has no right, title or interest in or to the undivided one-half part thereof.

2. That Adsit is entitled to a judgment for the recovery of the possession of the undivided one-half part of Lot 4 as against Malony and all persons claiming under him.

3. That Adsit is entitled to a judgment for costs. Rec., pp. 7, 8.

Judgment was rendered, according to the findings of the court, August 10, 1897. Rec., pp. 8, 9. On the same day, Malony filed his motion for a new trial, alleging insufficiency of evidence and errors of law occurring at the trial. Rec. pp. 9, 10.

This motion was overruled August 20, 1897. Rec., p. 11.

Malony appealed and filed his assignment of errors August 31, 1897. Rec., pp. 11 to 15 inclusive. This document assigns the errors complained of with particularity and exactness.

A writ of possession was issued and the Marshal

served it by placing Adsit in possession of the property, September 20, 1897. Rec., pp. 16, 17.

Then follow the usual notice of appeal, petition and affidavit, the latter showing the property in dispute to be of a value exceeding $5,000. Rec., pp. . 18, 19.

The bill of exceptions, setting forth the evidence and the rulings of the court, is to be found in the Record, pp. 19 to 56, inclusive. Then follows the usual appeal bond, citation, order to certify the Record, and the certificate of the clerk. Rec., pp. 56, 57, 58.

For the information of the court, we have made abstracts of the titles claimed by the respective parties. They are as follows:

Adsit's Claim of Title.

1. April 22, 1881, W. E. Hunt, location notice Lot 4, Block 4, Rec., p. 29.

2. May 6, 1881, Joseph Twan to Northwestern Trading Company, deed (trust), Lot 4, Block 4. Rec., p. 21.

3. Sept. 12, 1881, J. M. Cooper, attorney in fact for W. E. Hunt to Joseph Twan (no power of attorney or other evidence of authority) deed, Lot 4, Block 4, Rec., p. 29.

4. March 22, 1888, Joseph Twan to Wm. Van Gasken, deed, undivided one-half of Lot 4, Block 4. Rec., p. 22.

5. July 13, 1888, William Van Gasken to Alaska Mercantile and Packing Company, deed, undivided one-half of Lot 4, Block 4. Rec., p. 23.

6. July 21, 1891, certified copy of Articles of In-

corporation of Alaska Mercantile and Packing Company, filed for record in Juneau Recording District. The articles are dated *March* 12, 1888, appear to have been filed in the office of the secretary of Washington Territory, *March* 15, 1888, and the copy filed in Juneau was certified by the secretary of State of Washington, *June* 23, 1891. Rec., pp. 26 to 28, inclusive.

7. October 21, 1891, Alaska Mercantile and Packing Company to William J. Thompson, deed (without corporate seal), undivided one-half Lot 4, Block 4. Rec., p. 24.

8. March 24, 1894, William J. Thompson and wife to O. H. Adsit, deed undivided one-half Lot 4, Block 4. Rec., p. 25.

Mem.—

This purports to be the record of a deed filed for record April 4, 1894, and recorded in Book 10 of Deeds, p. 13, the deed having been executed before "J. M. Brown, county clerk and clerk of the Superior Court," the venue being, "State of Washington, County of Pierce." See pp. 20 and 26 of Transcript.

The original deed was also offered in evidence by plaintiff, and it appears from it that the venue of the acknowledgment is "United States, District of Alaska," and that the acknowledgment was made by "J. M. Brown, county clerk and clerk of Superior Court."

There are no counties, county clerks, or Superior courts in Alaska.

Malony's Title.

1. November 24, 1891, marshal's deed to Alfred H. Gamel, by virtue of writ of execution out of United States District Court, on judgment recovered July 25, 1891, in favor of Aaron Shellhouse against Wm. VanGasken and —— Birmingham, formerly partners under the firm name of Alaska Mercantile and Packing Company, deed for undivided one-half Lot 4, Block 4. Rec., pp. 38 to 40, inclusive.

2. January 20, 1894, A. H. Gamel to Emery Valentine, deed undivided one-half Lot 4, Block 4. Rec., pp. 40 to 41.

Mem.—

This deed was made by J. F. Malony as attorney in fact, power of attorney of record. Rec., pp. 43 and 44.

3. January 20, 1894, Emery Valentine to J. F. Malony, deed undivided one-half Lot 4, Block 4. Rec., p. 42.

Argument.

I.

By the treaty of March 30, 1867 (15 Stat., 539), Russia ceded Alaska to the United States. By the terms of the treaty the fee simple title to certain real estate conferred under Russian rule upon certain individuals and the Greek Oriental Church, was confirmed. (Sec. 23, L. D. 417.) No provision was made for the disposition of the other lands in Alaska, by the treaty or otherwise, until the act of May 17, 1884 (23 Stat., 84) which provided a government for the District of Alaska, and extended the United States *mineral land laws* over the District.

It was provided therein that the *status quo* as to the use and occupancy of lands for other than mining purposes should be preserved until Congress should act, and that nothing in the act should be construed to put in force in the District the general land laws of the United States (see 23 L. D., 419). The title to the lands remained in the United States (*Kinkead vs. United States*, 150 U. S., 483). Sec. 2387 R. S. (the townsite section) was not operative in Alaska until the enactment of the law of March 3, 1891 (26 Stat., 1099). The town of Juneau was entered under the authority of the latter act, October 13, 1893 (see 23 L. D., 417), and patent thereon was issued September 4, 1897.

Section 7, of the act of May 17, 1884, *supra*, made the general laws of Oregon applicable to Alaska. The section is still in force.

II.

We will consider the assignments of errors in their order, and as they are set forth at length in the Record, we will content ourselves with summarizing them.

First.

In this assignment, Rec., p. 11, it is alleged that the court erred in overruling defendant's demurrer to the complaint for the reason that it did not state facts sufficient to constitute a cause of action.

1. The complaint, Rec., p. 1, avers that the plaintiff and his grantors have been the owners by right of prior occupancy and actual possession for more than nine years. This is not an averment of

a "legal estate in real property, and a present right to the possession thereof," as required by the laws of Oregon.

Sec. 316 (313) of Hill's Oregon Code provides: "Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action of law. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of anyone, then against the person acting as the owner thereof."

A suit brought under this section is an action of ejectment. *Goldsmith vs. Smith*, 10 Saw., 294, an Oregon case.

It is an elementary rule that the plaintiff must have a present right of possession.

Cincinnati vs. White, 6 Peters, 431 (441);
Heffner vs. Betts, 32 Pa. St., 376;
Payne vs. Treadwell, 5 Cal. 310;
At commencement of suit, *Kile vs. Tubbs*, 36 Ind., 332;
And at time of trial; Cresap vs. Huston, 9 Gill, 269;
Alden vs. Grove, 18 Pa. St., 377.

The averment is that the defendant is in possession.

Title is presumed from possession. *Stark vs. Starr*, 1 Saw. 15, an Oregon case. The presumption of title in the defendant arising from his possession of the realty must be overcome by proof of title in the plaintiff, which is good at least as against the defendant.

People vs. Leonard, 11 Johns., 504;
Eldon vs. Doe, 6 Blackf., 341;
Stanford vs. Maugin, 30 Ga. 355.

These are all fundamental rules in the law of ejectment, and are applicable to this case. The pleader seems to have had them in mind to some extent, but he failed to plead "the nature of his estate in the property, whether it be in fee, for life, or for a term of years," as required by sec.318 (315) of Hill's Oregon Code, which is as follows:

"The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage such sum as may be therein claimed." * * *

A complaint in ejectment to be sufficient, must comply with that section.

Thompson vs. Wolf, 6 Or. 308;
Johnson vs. Crookshanks, 28 Pac. Rep. 78.

2. The complaint is insufficient, we think, because it avers that the defendant has ousted the plaintiff of an "undivided half interest," one "James Winn" being "the owner of the other undivided one-half part or interest." So there are two persons occupying this lot, each holding an *undivided* half, but Malony was chosen as the one who had ousted the plaintiff from an undivided half.

According to the complaint, Malony and Winn had been actually in the occupancy of the lot since April 29, 1891. In such case if Adsit felt himself the rightful co-tenant of Winn, he should have brought his suit in equity for the purpose of determining such adverse claim. In accord with our views are *Goldsmith vs. Smith*, 10 Saw 294, and *Goldsmith vs. Gilliland*, 10 Saw, 666, both Oregon cases.

3. Having failed to comply with the statutory provisions which we have copied, it will be considered by the law that he endeavored to bring the action as in forcible entry and detainer. *Thompson vs. Wolf*, 6 Or., 308. But here he encountered certain statutory provisions. By Sec. 3510, Hill's Oregon Code, it is enacted that—

> "When a forcible entry shall be made upon any premises, or when an entry shall be made in a peaceable manner, and the possession shall be held by force, the person entitled to the premises may maintain an action to recover the possession thereof before any justice of the peace of the county in which such real property is situated."

And section 3511 is as follows:

> "In such action it shall be sufficient to state in the complaint the description of the premises with convenient certainty that the defendant is in possession thereof, that he entered upon the same with force, or unlawfully withholds the same with force, as the case may be, and that the plaintiff is entitled to possession thereof."

This complaint neither alleges the forcible entry nor the forcible detention of the property.

The legislature of Oregon saw fit to declare what should be an unlawful holding by force. Secs. 3519 and 3520 of Hill's Oregon Code are as follows:

> "Sec. 3519. The following shall be deemed cases of unlawful holding by force within the meaning of this chapter:
>
> 1. When the tenant or person in possession of any premises shall fail or refuse to pay any rent due on the lease or agreement under which he holds, or deliver up the possession of said premises for ten days after demand made in writing for such possession.
>
> 2. When, after a notice to quit as provided in this chapter, any person shall continue in the possession of any premises at the expiration of the time limited in the lease or agreement under which such person holds, or contrary to any condition or covenant thereof, or without any written lease or agreement therefor."
>
> "Sec. 3520. A notice to quit must be in writing and must be served upon the tenant or person in possession by being delivered to him or left at the premises in case of his absence therefrom."

Neither the allegations nor the proof in this case, as we will show later on, bring it within the purview of these statutes.

4. But if this complaint should be held sufficient otherwise, it must fall for the reason that the action was not commenced within three years from the time the defendant's possession began. The complaint alleges that the defendant, and his grantors, on or about the 29th day of April, 1891, entered

upon the premises and ousted the plaintiff and his grantors therefrom, "and from thence hitherto has wrongfully withheld and still wrongfully withholds the possession thereof from him, the said plaintiff." This complaint was filed in the court below May 25, 1896, more than five years from the day of the entry and ouster complained of. Therefore, this case clearly comes within Sec. 3524, Hill's Oregon Code, which is as follows:

> "In an action to recover the possession of any land, tenement, or other real property, where the entry is forcible, or when the possession is unlawfully held by force, the merits of the title shall not be inquired into; and three years' quiet possession of the premises immediately preceding the commencement of such action by the party in possession, or those under whom he holds, may be pleaded in bar thereof, unless the estate of such party is ended."

It will be noticed that this statute covers all actions brought to recover the possession of real property. In this connection we ask the attention of the court again to the fact that the defendant pleaded in bar of the action the three years' quiet possession of the premises immediately preceding its commencement.

For these reasons we submit that the first assignment of error is well taken.

Second.

In this assignment, Rec., p. 11, it is claimed that the court erred in allowing the plaintiff to introduce any evidence under the complaint because the com-

plaint was insufficient in law in this: That it does not appear therefrom that the plaintiff has a legal estate in real property, nor is the nature of such estate averred, whether it be in fee for life or for a term of years, as provided by the laws of Oregon; that it is alleged that the defendant ousted the plaintiff and his grantors from the possession of an undivided one-half interest in the property; that he wrongfully withholds that interest from the plaintiff, an impossible state of affairs and insufficient to maintain ejectment: and that the complaint considered as one in forcible entry and detainer is fatally defective in not alleging a demand in writing at least ten days before the commencement of the action.

For objections, see Rec., pp. 20, 29, 30.

All that we have said in favor of the first assignment of error is applicable here. If the complaint was insufficient in law, the court erred in admitting evidence in its support. Sec. 3519 of Hill's Oregon Code, elsewhere quoted in this brief, provides for ten days, notice in writing. There is no such notice in this Record.

Two-and-a-half.

This assignment, Rec., p. 12, is that the court erred in permitting the plaintiff to introduce in evidence the record of a paper purporting to be a notice of location of Lot 4 by W. E. Hunt, April 19, 1891. The objections to this evidence were that it is incompetent, immaterial and irrelevant, no foundation for the introduction of the evidence had been laid, because the absence of the original was not accounted for, that there was no provision of law at

that time providing for the making, filing and recording of such notice, or the making of such notice any evidence of any rights in the premises, and there is no provision of the law making admissible in evidence such purported record, it not purporting to be an instrument certified, proved, or acknowledged in any manner. For objections, see Rec., pp. 20, 29, 30.

The Record, pages 28, 29, shows that the court permitted the claimant to introduce in evidence the alleged record of a location notice as follows:

> "I claim Lot 4, in Block 4, in the town of Rockwell, as a homestead. April 22, 1881.
>
> W. E. HUNT."

This paper seems to have been recorded in Book "B" of Records. Defendant objected to the introduction of the Record and notice upon the ground of incompetency, immaterialty and irrelevancy, and that the proper foundation had not been laid. Rec., pp. 20, 30. These objections the court overruled and admitted the Record in evidence. The objections to this alleged record of notice are so clearly and fully stated in the assignment of error that we do not deem it necessary to repeat them here. This court will take cognizance of the fact that the town site laws of the United States were not in force in the district of Alaska until the pasage of the act of March 3, 1891 (26 Stat. 1099). Therefore it follows that such alleged location notice could serve no purpose, nor convey any rights, nor was it an instrument which could be recorded under the law. Neither the instrument, nor the purported record of it, was admissible in evidence, as we think.

It was held by this court in *Carter vs. Ruddy*, 166 U. S., 493, that an action in ejectment can not be maintained on an equitable title. There is nothing in the case before the court to exempt it from the rule that a patent is necessary in order to convey legal title. Here there was neither an entry nor a patent.

Third.

This assignment, Rec., p. 12, is based on the introduction of a book of deeds of the Juneau recording district, purporting to be the record of a conveyance from Cooper to Twan of the lot in dispute, and over the following objections: That it was not shown that Cooper ever occupied or was in possession of the lot, or had any claim thereto; that Cooper purports to be the attorney in fact of Hunt, but said conveyance was not executed by Hunt through his attorney in fact; that there was no proof that Cooper was the attorney in fact of Hunt; that the purported conveyance does not appear to have been acknowledged or so proved as to entitle it to record; that there was no evidence that it was ever executed by Cooper as attorney in fact or otherwise, and that no foundation was laid for its introduction, even if competent, relevant or material.

For objections, see Rec. pp. 20, 29, 30.

1. The foundation of the plaintiff's alleged title appears to have been a location notice by W. E. Hunt, dated April 22, 1891, claiming as a homestead Lot 4, in Block 4, in the town of Rockwell, now Juneau, although the homestead laws were not in force in Alaska until the act of May 14, 1898, acts 2d Sess,, 55th Cong., 409. By the alleged deed,

dated September 12, 1881, J. M. Cooper, styling himself "attorney in fact for W. E. Hunt," pretended to transfer the land to Joseph Twan. Rec., p. 29.

This is quite a remarkable instrument, and we will copy it here:

> "Know all men by these presents, that I, J. M. Cooper, attorney in fact for W. E. Hunt, for and in consideration of the sum of twenty dollars, lawful money of the United States, in hand paid by Joseph Twan, the receipt of which is hereby acknowledged, has bargained, sold, and forever quit-claimed unto the said Joseph Twan, and by these presents do forever quit-claim all my right, title, and interest in one town lot in the town of Rockwell, Alaska, known as Lot 4, in Block 4, with all and singular the hereditaments and appurtenances belonging thereto.
>
> Witness my hand and seal the 12th day of September, 1881.
>
> J. M. COOPER,
> Attorney in fact for W. E. Hunt.
>
> Witnesses:
> R. DIXON,
> I. BOOKER."

It will be noticed that it purports to be and is the conveyance of "J. M. Cooper, attorney in fact for W. E. Hunt," who, after acknowledging the receipt of a certain consideration, proceeds to assert that he "has bargained, sold, and forever quit claimed unto the said Joseph Twan, and by these presents do forever quit-claim all my right, title, and interest in one town lot," describing it "with all and singular the hereditaments and appurtenances belonging

thereto." Cooper describes himself as attorney in fact for W. E. Hunt. *The language used is merely a description of the person.* The deed does not purport to be the deed of W. E. Hunt. It does not purport to quit-claim or convey any title or interest in the property that he may have, but it does undertake to convey all of the title and interest therein that J. M. Cooper may have. If an attorney in fact has power to convey lands he must do it in the name of his principal. The principal must grant the land or it is not granted at all.

2. Again, there is nothing in this record to show, either antecedent or subsequent to the introduction of this paper in evidence, that J. M Cooper was the attorney in fact for W. E. Hunt. He could not occupy that relation with reference to the conveyance of an interest in real estate without being possessed of a written authority signed, acknowledged, and hedged about with all of the solemnities which the law prescribes for a deed conveying an interest in real estate. In order to enable an agent to execute a deed for his principal, he must have a power of attorney duly executed under seal. 5 Am. & Eng. Ency. of Law, 439.

In the absence of proof showing that he was actually the attorney in fact for Hunt, and had the power to convey the real estate, this alleged deed was inadmissible in evidence.

3. In this connection, the case of *Fowler vs. Shearer*, 7 Mass. 14, is both interesting and instructive. There the deed began:

> "Know ye that I, Abigail Fowler, of Palmer, gentlewoman, and also as the attorney of John

> Fowler, in consideration," etc., "paid by Daniel Shearer, of Palmer," etc., "have given and granted, and by these presents do give and grant," etc.

The language of the remainder of the deed purports to be her conveyance and her covenants. She covenants therein that she is the sole owner, has in herself good right to sell, and that she and her heirs will warrant the title. Then the instrument concludes:

> "In witness whereof I have hereunto set my hand and seal this seventh day of August, A. D. 1805."

It will be observed that there is a striking similarity between this deed and the one executed by J. M. Cooper, attorney in fact. In passing on the Fowler deed, the court said:

> "But if she had authority to pass the land described in the deed, the authority should have been pursued, and the deed must have been the deed of her husband. It ought to have been in his name, and as his proper act. His name and seal should have been put to it, in order to pass his estate, as well as her own name and seal to pass her estate. But she in fact, after naming herself the attorney of her husband, assumes to convey the estate in her own name; all the covenants are her own; and she executes the deed only for herself and in her own name. * * * But we are satisfied that it is not the deed of the husband. If an attorney has authority to convey lands, he must do it in the name of the principal. The conveyance must

be the act of the principal and not of the attorney, otherwise the conveyance is void. And it is not enough for the attorney in the form of the conveyance to declare that he does it as attorney; for he, being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name."

In this Massachusetts case, the deed was accompanied by a power of attorney, but no power of attorney was shown in behalf of Cooper in the case before the court.

4. Again, this pretended deed was not acknowledged, and therefore could not be admitted to record, nor could the record be admitted in evidence.

Fourth.

In this assignment, Record p. 12, it is averred that the court erred in admitting in evidence what purported to be the record of a mortgage, or deed of trust, from Joseph Twan to the North West Trading Company, over these objections: That it appeared to be cancelled on the Record; that it was entirely immaterial and irrelevant to the issues of the case, as it did not show, or pretend to show, that Twan ever occupied or was in possession of the premises in dispute; that the pretended record thereof is not a record in this, that the purported instrument does not appear to have been acknowledged, or certified, or so proved, as to entitle it to record under the laws of Oregon then in force in the district of Alaska, and that there was no proof that Twan ever executed the mortgage or deed of trust.

The Record shows, pp. 19 to 22, that there was

introduced in evidence what purported to be the record of a deed of trust, from Joseph Twan to the North West Trading Company, to secure to the grantee payment of $232.41, four months from the date of the deed, May 6, 1882. For the record of the offer of this evidence see the bottom of page 19, and for the objections see Rec., p. 20, transcript 40. The objections were that it was incompetent, immaterial, and irrelevant; that it appears upon the pages of the record that the instrument has been cancelled; that it does not appear that the instrument was ever acknowledged or certified to, entitling it to record under the laws of Oregon, and that the proper foundation for its introduction has not been laid.

It is true that this instrument does not appear to have been acknowledged. It is also true, according to the Record, p. 22, near the top thereof, that there appears across the face of the Record these words: "Cancelled at the request of Carl Sphuhu, N. W. T. Co., and Joseph Twam. Oct. 6, 1884."

As the instrument does not appear to have been acknowledged, it was not admissible of record, and therefore, the record was not admissible in evidence. As the instrument was nothing but a deed of trust at any time, and as it had been cancelled long before Adsit claimed title to an interest in the premises, it had fully performed all of its functions, and had no relation to this controversy. That all concerned understood that this instrument was *functus officio* is clearly established by the fact that March 22, 1888, Joseph Twan executed a deed for the property to William Van Gasken, Rec., p. 22.

Fifth.

In this assignment, Rec., p. 13, it is stated that the court erred in admitting in evidence what purports to be the record of a deed from Joseph Twan to William Van Gasken of an undivided one-half interest in Lot 4, over these objections: That it was immaterial and irrelevant; that no proper foundation had been laid for its introduction; and that it did not appear by the evidence that Twan had any interest or title which he could convey.

This deed is to be found on page 22 of the Record, and purports to quit-claim to the grantee what interest the grantor had in the undivided one-half of Lot 4. The objections to the introduction of this evidence, as stated in the assignment and on Rec., p. 20, we think to be well taken. We submit that Hunt's location did not give him any right or interest in the property; that the deed of Cooper to Twan did not convey to the latter any right or interest therein; and that, therefore, Twan had nothing that he could convey to VanGasken. Men cannot acquire rights to property by exchanging deeds, for deeds are only operative when there is some right, title, or interest which they can convey.

Sixth.

In this assignment, Rec., p. 13, it is charged that the court erred in admitting in evidence the record of a purported deed from William Van Gasken to the Alaska Mercantile and Packing Company of an undivided one-half interest in Lot 4, and it is insisted that it was immaterial, irrelevant, no proper foundation had been laid for its introduction, and that it did not appear that Van Gasken had any

title or interest in the lot which he could convey.

For objections, see Rec., pp. 20, 30.

The deed thus spoken of is to be found on Rec., p. 23, and all that we said in support of the fifth assignment applies here.

If Van Gasken got no title by the deed executed to him, it is clear that he had none which he could convey to the grantee named in this deed. Moreover, the alleged incorporation of the company named as grantee in this deed had not been proven or established.

Seventh.

In this assignment, Rec., p. 13, it is averred that the court erred in admitting in evidence an exhibit purporting to be the certified copy of Articles of Incorporation of the Alaska Mercantile and Packing Company, certified to by the secretary of state of the State of Washington. The objections to this document were that it was incompetent, proper foundation for its admission had not been laid; that it did not appear that the purported articles were in accordance with the laws of the State of Washington or the late Territory of Washington, or that the corporation had complied with the laws of Washington in any relation to corporations, or that the purported corporation had any existence as a corporation in the State or Territory of Washington; and that it did not appear by any evidence that the company had complied with the laws, if any, of Washington relating to the filing and recording of articles of incorporation, so as to make a certified copy evidence in the courts of the District of Alaska.

For objections, see Rec., pp. 20, 30.

These alleged Articles of Incorporation are to be found on pages 26, 27, 28 of the Record. The Articles are preceded by the certificate of the Secretary of State, in which he says that he has compared the copy with the original Articles now of record in his office, and finds the same to be a true and perfect copy. The Articles purport to have been executed March 12, 1888, before a notary public in Pierce county, Territory of Washington, Rec., p. 28. They were filed in the office of the secretary of Washington Territory, March 15, 1888, and recorded March 30, 1888, Rec., p. 28. The instrument was recorded July 21, 1891, in the Juneau Recording District, Rec., p. 28.

But a power of attorney should have been filed also.

Sec. 3276, Hill's Oregon Code, is as follows:

> "A foreign corporation, before transacting business in this state, must duly execute and acknowledge a power of attorney, and cause the same to be recorded in the county clerk's office of each county where it has a resident agent, which power of attorney, so long as such company shall have place of business in the state, shall be irrevocable except by the substitution of another qualified person for the one mentioned therein as attorney for such company."

Sec. 3277 enacts that such attorney shall be a citizen of the United States and of the State of Oregon, and the power shall authorize and empower him to accept service of all writs and processes, and shall constitute him the attorney and agent of the cor-

poration upon whom lawful and valid service may be made of all writs and processes in any action, suit or proceeding by or against the corporation.

Eighth.

In this assignment, Record, p. 13, it is averred that the court erred in admitting in evidence what purported to be a record of conveyance from the Alaska Mercantile & Packing Company to W. J. Thompson, purporting to convey to him an undivided one-half interest in Lot 4, over the following objections: That it was incompetent, immaterial and irrelevant, it not appearing that the company was authorized to own or convey real estate or had any interest in or title to the lot; that it did not appear by any evidence that the purported conveyance was executed by the corporation or authorized by it to be executed, and it appeared affirmatively that it was not executed under its corporate seal. It was also objected that the purported record is not a record, and is wholly incompetent as evidence, because it purports to have been executed in the State of Washington, and acknowledged before a notary public, but was unaccompanied by a certificate attached thereto of the clerk, or other proper certifying officer, of a court of record, under the seal of his office; that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be, and that he believes the signature of such persons subscribed thereto to be genuine, and that the deed is executed and acknowledged according to the laws of that State. It not appearing from the Record that the deed had such certificate

attached, it was not, under the laws then in force in the district of Alaska, proper to be recorded, and it was wholly incompetent as evidence for any purpose.

For objections, see Rec., pp. 20, 30.

By referring to the alleged Articles of Incorporation, Article II, Record p. 27, it will be seen that the corporation had the power to carry on a general mercantile business in Washington and Alaska under the laws therein cited, and to engage in the business of packing and preserving fish in Washington and Alaska, and to do and perform any act or acts, and to construct and maintain any building or buildings, and to do and perform all other acts necessary in carrying out, or cognate to, the objects of the company.

The alleged deed from this corporation to William J. Thompson is on pages 24 and 25 of the Record. The deed does not bear the corporate seal, although it is well settled that a corporation cannot execute a deed except under its coroprate seal.

In re St. Helen Mill Company, 3 Saw. 88;
Eagle Woolen Mills vs. Montieth, 2 Or. 277;
Richardson vs. Scott R. W. & M. Co. 22 Cal., 156;
Angell & Ames on Corporation, Sec. 295.

This deed was acknowledged by the officers of the company in Pierce County, State of Washington, October 21, 1891, before a notary public, who attached his seal to the certificate, but there is no certificate attached from the clerk, or other proper certifying officer, that the person whose name is subscribed to the certificate of acknowledgment

was, at the date thereof, such officer as he is therein represented to be, etc. In the absence of such a certificate as that, the instrument was not admissible to record in Alaska, nor was the record admissible in evidence in its courts.

Ninth.

In this assignment, Rec., p. 14, it is stated that the court erred in admitting in evidence an exhibit purporting to be a deed of the property in dispute from W. J. Thompson and wife to O. H. Adsit, and purporting to be recorded in Book 10 of the deeds of the Juneau Recording District. This was admitted in evidence over the following objections: that it did not appear by any evidence that Thompson and wife were inhabitants of the town of Juneau, or ever were inhabitants thereof, or that they ever occupied or had been in possession of said premises, or that they had any title or interest in the premises which they could convey; that the deed was wholly incompetent as evidence for any purpose, and was not entitled to be recorded, because the deed purports to have been acknowledged in the District of Alaska before the county clerk of the district, and is signed by the county clerk under the seal of the Superior Court. The trial court was bound to take judicial notice of the fact that there is no such officer as a county clerk in Alaska, there being no such subdivisions in the territory as counties, and that there is no such court as a Superior Court.

For objections, see Rec., pp. 20, 30.

This alleged deed from Thompson to Adsit is to be found on pages 25 and 26 of the Record. This

instrument purports to have been executed before "J. M. Brown, county clerk and clerk of the Superior Court," in Pierce County, State of Washington. Later on in the trial the plaintiff offered in evidence what he claimed was the original deed from Thompson to Adsit, Rec., p. 31.

Counsel for defendant interposed the same objection as was made to the introduction of the record of the deed which appears on pages 25 and 26 of the printed record. This objection was overruled and exception was duly taken. This instrument bears date of March 24, 1894, and was acknowedged in the District of Alaska on that day before "J. M. Brown, county clerk and clerk of the Superior Court."

In this connection it is interesting to note the fact, as shown by page 48 of the Record, being page 90 of the Transcript, that near the end of the trial the following admission was made:

> "It is here admitted by the plaintiff that the Thompson named as the grantor in the deed from W. J. Thompson and wife to plaintiff never lived in the District of Alaska."

Turning to the copy of the alleged deed, found on pages 25 and 26, we will observe that it does not contain the usual and necessary certificate from a superior officer that J. M. Brown was the clerk of the court, etc. Without such certificate the deed could not be admitted of record, and the record thereof was not admissible in evidence.

Tenth.

It is next assigned as error, Rec., p. 15, that the court erred in denying the motion for judgment of non-suit made at the close of the plaintiff's case,

upon the theory of an entire failure of proof, and for these reasons: The evidence failed to show that the plaintiff was the owner, either by himself or grantors, either by the right of occupancy and possession of, or of any other right in, the premises in dispute, and that there was no evidence of the ouster of the plaintiff by the defendant.

For objections, see Rec., pp. 20, 30.

The record evidence, which has been considered under the previous assignments in error, fails to show that any of the grantors possessed a grantable right, title, or interest in and to the property in question, and it follows, therefore, that the plaintiff had no right, title, or interest which he could litigate with the defendant, or which would be taken cognizance of by the law.

After the introduction of the alleged record evidence, the plaintiff put upon the witness stand John Olds, who testified (p. 32 to 33) that Joe Twan built a house on Lot 4, in 1882, and occupied it for a dance house. After that it was occupied as the Palace Theater, by Hart and Moore, in 1885 and 1886. On cross-examination he said that later on it was occupied as a store by Kaufman Brothers, as the tenants of Mr. Malony.

Edward James testified (Rec., pp. 34, 35, and 36) that Joseph Twan built a house on the lot in the spring of 1882, and ran it as a dance house for three or four years. Then it was occupied by Hart and Moore for a theater on a lease from Twan, who kept possession of the premises until the alleged sale to the Alaska Mercantile and Packing Company. That company occupied the house for mercantile purposes

in 1888 or 1889, when it was rented to a man by the name of Howard, who ran a store there. On cross-examination he said that the Alaska Mercantile and Packing Company had not done any business in Juneau since 1888 or 1889, and none in the Territory of Alaska, unless it was fishing at Idaho Inlet.

John G. Heid testified (Rec., p. 37) that he had lived in Juneau since 1885, and was acquainted with the premises in dispute. He says that when he first came to Juneau, Joseph Twan was in possession and ran a dance house. Subsequently, he made a lease to Hart and Moore, who ran a theater. Subsequently, Slim Jim and William McFee bought into it, and that fall he sold out to the Alaska Mercantile and Packing Company, which continued business there until the fall of 1889 or 1890, when it closed out. Mr. Heid says that subsequently he acted as the agent for the Alaska Mercantile and Packing Company. It seems that a man by the name of Howard was in possession a part of the time under the Packing Company. After Howard moved out of the premises, the building was vacant for quite a while. Mr. Heid endeavored to rent it and tried to sell it for the Alaska Mercantile and Packing Company but did not succeed in getting any tenant after Howard left it. He had no recollection of anybody being in it after that time until suit was commenced by Mr. Shellhouse, and after Mr. Gamel bought it in under that suit.

This evidence, both oral and in writing, fails to show that the plaintiff was entitled to the relief which he asked for in the complaint. It is an elementary rule that a plaintiff in ejectment must re-

cover on the strength of his own title, and can take nothing by reason of defects in the title of the defendant. *Watts vs Lindsay*, 7 Wheat., 158.

Actual possession, not the constructive possession, must be averred and proved to support the action.

> *Russell vs. Desplons*, 29 Ala., 308;
> *Singleton vs. Findley*, 1 Port. (Ala.), 144; 3 Wait Act. & Def. 396;
> *Stringfellow vs. Cain*, 99 U. S., 616, 617.

The plaintiff in ejectment who rests his claim upon prior possession must allege and prove that he had such possession within the time fixed by the statute of limitations. *Young vs. Irwin*, 2 Hayward, 9; 3 Wait Act. & Def., 22.

The plaintiff wholly failed to make such proof. Indeed it would not have been legally possible for him to make that proof in view of the fact that his verified complaint charged that the defendant and his grantors, since April 29, 1891, had retained possession of the property. Rec., pp. 1 and2.

Elsewhere in this brief, we have quoted Sec. 3524, Hill's Oregon Code, in which it is provided that three years' quiet possession of the premises, immediately preceding the commencement of the action, may be pleaded in bar thereof, and we have asked the attention of the court to the fact that the defendant did plead that three years' bar in the fourth paragraph of his second answer. See Record top of page 5.

For these reasons, and the others hereinafter set forth, we submit that the court erred in denying

the defendant's motion for a non-suit. For this motion, see Record, p. 38, Transcript 71. The court overruled the motion and the defendant excepted.

Eleventh.

The next assignment, Rec., p. 15, is that the court erred in denying the motion for a new trial, for the reasons that the evidence is insufficient to justify the decision of the court in this: That there was no evidence showing or tending to show the plaintiff to be the owner of the premises or entitled to the possession thereof, or that he had any legal estate therein, or that the defendant ousted or ejected the plaintiff or his grantors from the premises, or that he wrongfully withheld the possession of the property from the plaintiff; also, on account of errors of laws occurring at the trial and excepted to by the defendant, which are more particularly set forth in the preceding assignments of error.

For objections, see Rec., pp. 20, 29, 30

The defendant introduced the following evidence:

1. A deed from Orville T. Porter, United States marshal for the District of Alaska, to Alfred H. Gamel, dated November 24, 1891, and duly acknowledged. Rec., pp. 38. 39, and 40.

This deed recites the rendition of a judgment in the United States District Court for the District of Alaska, July 25, 1891, in favor of Aaron Shellhouse against William VanGasken and —— Birmingham, partners under the firm name of the Alaska Mercantile and Packing Company, and the issuance of an execution thereon, July 27, 1891, which was delivered to the marshal, who levied the execution upon

the undivided one-half interest in and to Lot 4, together with an undivided one-half interest in and to all buildings and improvements thereon situated. All this property he advertised for sale and sold August 31, 1891, to Alfred H. Gamel, his heirs and assigns, conveying thereby all the right, title, and interest which the said Van Gasken and Birmingham, as the Alaska Mercantile and Packing Company, had, on the 27th day of April, 1891, or at any time afterwards.

2. A deed of the property in controversy from Gamel and wife to Emery Valentine, dated January 20, 1894. Rec., pp. 40, 41.

3. A deed from Emery Valentine to J. F. Malony, dated Jaunary 20, 1894. Rec. p. 42.

4. A power of attorney from Gamel and wife to John F. Malony, dated April 2. 1892.

The foregoing instruments were all duly recorded.

John F. Malony testified, Rec., p. 44, that he had lived in Juneau since 1885, and had been in possession of an interest in the property since August 31, 1891, at which time he got a certificate of the sale from the marshal, *and since that date he had been in the continuous possession of the property, either by himself or by his tenants. He also stated that during that time his possession had not been disputed by anyone; that he had made improvements on the premises, building a new addition on one side, and when the building burned down practically it was rebuilt by him.* He testified, as the other witnesses did, that the Alaska Mercantile and Packing Company abandoned Alaska as a field for the doing of business in 1887 or in 1888, and since

that time it had not had an agent in the territory to his knowledge. He said that no one by the name of Thompson had lived on the property since 1885. On cross-examination he said that Mr. Heid had made some threats against his title to the property, and that the witness had indemnified his tenants on that account.

O. H. Adsit, grantee in the deed from W. J. Thompson and wife, testified that the purchase was made through Mr. Hale, of Tacoma, Washington, where Thompson lived at that time.

John Olds was called and testified that he did not know of a man by the name of W. J. Thompson, living in Juneau. Then it was admitted by the plaintiff that the Thompson named as the grantor in the deed spoken of never lived in the District of Alaska.

The defendant then introduced in evidence the complaint, judgment, execution, notices, writ of execution and advertisement, in the case of Shellhouse, plaintiff, vs. Van Gasken and Birmingham, partners under the firm name of the Alaska Mercantile and Packing Company. Rec., pp. 49 to 55.

We submit that the evidence shows that the defendant was entitled to judgment. If anyone owned any right, title, or interest in and to the premises in controversy at the time the execution was levied upon the property, it was the Alaska Mercantile and Packing Company. It is shown by the evidence that the company had the property in its possession as late as 1888 or 1889, and that subsequently it was looked after by their agent there, and was occupied a portion of the time by Howard.

The marshal's sale vested in the purchaser every right, title, and interest that belonged to the Alaska Mercantile and Packing Company, whether it was a partnership or a corporation. The judgment of the court adjudged it to be a partnership. Rec., p. 56.

Malony shows that he, by himself and tenants, had been in the continuous and undisturbed possession of the property since August 31, 1891, when he got from the marshal a certificate of the sale of the land. In this he is corroborated by the averment in the complaint that he and his grantors had been in possession of the property since April 29, 1891.

It is also admitted by the plaintiff, Rec., p. 48, that Thompson and wife had never lived in Alaska, and therefore it is perfectly apparent that they never entered into possession under the deed which was made to them March 24, 1894. It is also practically admitted by the plaintiff's witnessess that the property had been in the adverse possession of Malony and his tenants for several years prior to the trial. Heid, pp. 33, 34; Olds, pp. 35, 36.

Therefore, it is not only admitted by the plaintiff in his complaint, but it is also established by his own evidence, that he and his grantors have not been in possesion of the property since April 29, 1891, and that, during the interval, Malony and his grantors and tenants were in possession thereof. Malony shows that his possession was quiet and continuous after August 31, 1891. He has therefore shown more than three years' quiet possession, which, under Section 3524 of the Oregon Code, and the averments of his answer, is a bar to the action.

Twelfth.

The last assignment, Record p. 15, is that the court erred in rendering judgement for plaintiff and against the defendant. If the court should take the view that this was simply a controversy about the *possession* of the undivided half of lot 4 and the buildings thereon situate, we will ask special attention to the testimony upon the subject of possession of which the following is an abstract:

Plaintiff's Testimony.

JOHN OLDS: Thinks Joe Twan built the house in spring of 1882. Thinks he ran it as a dance house until 1883 or 4. Don't know when he got out of it; but thinks he occupied it until he sold it to "that mercantile and packing company". After Twan quit, the place was occupied by Jack Moore and Hart. They had what was known as the Palace Theatre there—in 1885-6. So far as he knew Twan was in possession until he sold to Alaska Mercantile and Packing Company.

CROSS-EX: Guesses different parties have been in possession for 4 or 5 years. Kaufman Brothers were in possession and had a store there for a time. Understands they were there as tenants. Don't know of his own knowledge. Thinks he introduced Kaufman to Malony with a view to renting the house (for Kaufman).

RE-DIRECT: This was about 1892 or 1893.

EDWARD JONES: Joe Twan built the house in spring of 1882. Ran a show and dance house there 3 or 4 years. Thinks Hart and Moore opened the place up as a theatre about 1885. Pretty sure Twan

was in possession up to the time he leased the place to the Palace Theatre.

JOHN OLDS: recalled. Always understood Twan was in possession up to the time he leased to the Palace Theatre people. Never heard anything to the contrary. Packing Company ran a general store in the building—could not say how long they continued business there—not very long—a year or two—thinks about 1888 or 1889. Old man Howard and another man then ran a store there. After he moved out, guesses Kaufman rented it. Don't recollect of any other person occupying it from Joe Twan down to the Palace Theatre and the Alaska Mercantile and Packing Company.

CROSS-EX: VanGasken represented the Packing Company. Don't know of anybody else who was interested in Company. Thinks they closed business about 1888 or 1889.

EDWARD JONES: Howard kept a store there.

Q. There was a continuous possession all the way down through these parties?

A. Yes; he had a store there.

JOHN G. HEID: Has lived in Juneau since April, 1885. Has known the lot since that time. Joe Twan was then in possession of the lot. The following year Twan made lease to Hart and Moore. Thinks Slim Jim bought into it and Wm. McFee, and that Fall he sold out to A. M. & P. Co., which continued business to Fall of 1889 or 1890, when they closed out. He went East in 1888 and came back in the spring and they were not doing business then. Afterward old man Howard paid rent. Gamel first represented the Company, and after-

wards he, witness, had charge. The Company occupied it nearly two years. Don't remember how long Howard was in there. After Howard moved out the premises were vacant quite a while. Did not succeed in getting tenant after Howard. No recollection of anybody occupying it until after Gamel bought it under Shellhouse suit.

Defendant's Testimony.

JOHN F. MALONY: Has been in continuous undisputed possession since August 31, 1891, when he got a certificate of the Marshal's sale; sixty days before making deed. Has put an addition on one side, and rebuilt the place after its practical destruction by fire. The A. M. & P Co. was represented in Juneau by Wm. VanGasken. Company was in business there a little over one year. Went away latter part of 1887 or along towards 1888. Has since done no business in Juneau. Does not know W. J. Thompson. Does not live in Juneau to his knowledge. Thompson never lived in that property since 1885, at least.

CROSS-EX: At sale of property, Mr. Heid gave notice to the effect that Birmingham and VanGasken did not own property. Has held possession by tenants. When Kaufman occupied it, he gave him an indemnifying bond. Kaufman did not dispute his title, but Heid made some threat against him. Did not indemnify any other tenants. Claim title by the execution sale and more than 5 years' undisputed possession, prior to suit. None of the improvements except the last repairs when the building burned down were made after suit. These

repairs cost $250 or $260. Other repairs cost $500 or $600, or more—would hardly exceed $700. At present has one room rented for $10, one for $15, main hall did rent for $50, but did not get much rent out of it. Has not received enough rent to pay for the improvements. It was vacant a considerable time until Kaufman went in there—they occupied it 1½ years at $30 per month. Millinery store has been there 6 or 8 months; $10 per month.

O. H. ADSIT: Never saw Thompson. He lives in Gilman near Seattle. Don't know that he ever lived in Alaska.

CROSS-EX: Hale, of Tacoma Grocery Company procured deed from Thompson to him.

Admitted by plaintiff that Thompson never lived in Alaska.

1. This testimony, as we think, clearly shows that the Alaska Mercantile and Packing Company had abandoned possession of the property a long time prior to the sale thereof made by the marshal. If so, anyone had the right to take possession and occupy the property to the exclusion of the Alaska Mercantile and Packing Company, and thus acquire rights which he could defend successfully as against that company or any of its grantees. It must not be forgotten that there was then no way in which that company could obtain title to real estate in Alaska, and that the only right which could be obtained by it was a possessory right, which right could be lost by abandonment or non-user. There can be no constructive possession of public lands. When one in possession of such property as this abandons it, he loses every shadow of claim thereto.

His right was a mere possessory right without other title. He had no rights which he could reserve. *Missionary Society vs. Dalles*, 107, U. S., 336. On page 344, the court said :

> "All persons, therefore, who settled upon the public lands acquired no rights thereby as against the Government. They were merely tenants by sufferance. The most they could claim was the right of actual occupancy as against other settlers. Such an occupant could yield his right of actual possession to another settler, but he could convey no other interest in the land. If he abandoned the land and another settler occupied it, the former lost all right to the possession. If he transferred the possession to another and the transferee abandoned the land, the first possessor could claim no right in the land unless he again took actual possession. In short, the settler had no right as against the Government, and no rights under the laws of the United States as against anyone else to the possession of the land in his actual occupancy, except and only so long as such occupancy continued."

To the same effect are—

Stringfellow vs. Cain, 99 U. S., 610 ;
Hussey vs. Smith, 99 U. S. 20 ;
Lownsdale vs. Parish, 21 How., 290 ;
Stark vs. Starns, 6 Wall,, 402 ;
Sabariego vs. Maverick, 124 U. S., 261.

It is true that after Malony had taken possession of this property, the Alaska Mercantile and Packing Company executed a pretended deed to William J. Thompson, bearing date of October 21, 1891. Be-

fore the execution of this deed the marshal had sold the property to Malony's grantor, and he had taken possession thereof, a possession which, since that time, has been continuous in the marshal's grantee and those claiming under him. But, supposing that the Alaska Mercantile and Packing Company had the right of possession, it is perfectly clear that it had no claim or color of title to the property, for the title belonged to the United States, as is held in the cases above cited, and in *Kinkead vs. United States*, 150 U. S., 483. Therefore, it follows that the company did not have a right of possession which could be transferred by deed or otherwise, unless the purchaser in possession should see fit to yield up or abandon the possession, and permit the grantee of the company to possess the property. *Daubinbiss vs. White*, 31 Pac. Rep., 360. Of course this is a familiar rule, and its application is plain.

Moreover, the evidence shows that the grantee of the company, W. J. Thompson, never had possession of the lot and was never in Alaska. March 24, 1894, Thompson executed a pretended deed to Adsit, but, at that time, Malony was in possession, he having obtained a deed therefor January 20, 1894, from Valentine, who was in possession and had obtained title from Gamel, the purchaser at the marshal's sale.

Thus it appears that the Alaska Mercantile and Packing Company and W. J. Thompson were not in possession of this property when they pretended to convey it, and that Adsit, who took a pretended deed from Thompson, has never been in possession

of it. The Alaska Mercantile and Packing Company is not covered by the rule in *Hussey vs. Smith*, 99 U. S., 20, because there is neither allegation nor proof that the Juneau townsite had been entered, nor does it appear either by allegation or proof that the company came under the terms of Sec. 12 of the act of March 3, 1891, 26 Stats., 1100.

There is not one word of proof or allegation bringing this company under the provisions of that act or of any of the rules and regulations made by the Secretary of the Interior.

Section 2327 R. S. did not operate in Alaska until March 3, 1891, and there is no pretense that either before or after that time the Alaska Mercantile and Packing Company, or its grantors, or grantees had acquired any right or title in any of the methods known to the laws of the United States. Adsit has never had possession of the property. His grantor, Thompson, never had possession of it. Adsit only had such rights as Thompson had. It is admitted, and also clearly established by the evidence, that Thompson never had possession of the property. This possession was abandoned by the Alaska Mercantile and Packing Company in 1888 or 1889, certainly prior to 1891. Gamel, the Marshal's grantee, took possession of it, and he and his grantees have held possession until the present time.

We submit that the doctrine laid down in *Missionary Society vs. Dalles*, 107 U.S., 336, establishes the right of Malony to this property. The Alaska Mercantile and Packing Company abandoned the property in 1888 or 1889, as the evidence shows, we

think, but, at any rate, it is absolutely clear that it abandoned the property when it executed the pretended deed to Thompson, October 21, 1891.

Newman vs. Franklin, 28 N. W. Rep., 579;
Trevaskis vs. Peard, 44 Pac. Rep., 246.

2. For the purposes of this case, it does not matter whether the Alaska Mercantile and Packing Company was, in fact and in law, a corporation or a partnership. When Shellhouse brought suit, he charged that Van Gasken and Birmingham were partners under the firm name of the Alaska Mercantile and Packing Company, and his complaint was verified, Rec., p. 49. The judgment shows that the defendants were regularly served with process, and it adjudges them partners, "formerly partners as the Alaska Mercantile and Packing Company," Rec., p. 50. The previous entry, Rec., p. 50, shows that the defendants had been regularly served with process by publication, and they were then defaulted July 13, 1891. The judgment was rendered July 25, 1891. This publication was evidently under Sec. 56, Hill's Oregon Code.

Adsit introduced in evidence the complaint, default, judgment, execution, etc., presumably upon the theory that he could thereby, and in this sort of an action, attack the validity of the marshal's sale, although the judgment on which the sale was based recites the partnership of Van Gasken and Birmingham in the name of the Alaska Mercantile and Packing Company.

Upon collateral attack, recitals in the judgment are conclusive upon parties thereto and upon those

claiming under them. *McCauley vs. Fulton*, 44 Or., 359. So it would seem to be established conclusively that this Alaska Mercantile and Packing Company is a partnership and not a corporation.

There is nothing in the Record to show that the company of the same name, which it is alleged was organized under the laws of Washington, was the Alaska Mercantile and Packing Company, which at one time had possession of this property. A corporation in Washington and a partnership in Alaska may well have the same name. The presumptions are all against the foreign corporation theory and in favor of the partnership idea.

We respectfully submit that the defendant, Malony, should have had judgment, and that the judgment of the court below should in all things be reversed.

W. W. DUDLEY,
L. T. MICHENER,
OSCAR FOOTE,
Attorneys for Appellant.

In the

Supreme Court of the United States

No. 67.

JOHN F. McLOUTH,
Appellant,

vs.

O. H. ADSIT,
Appellee.

Appellant's Reply Brief.

W. W. DUDLEY,
L. T. MICHENER,
OSCAR FOOTE,
Attorneys for Appellant.

Supreme Court of the United States.

October Term, 1899.

No. 67.

JOHN F. MALONY,

vs.

O. H. ADSIT.

APPELLANT'S REPLY BRIEF.

The brief filed on behalf of the appellee, we think, is entitled to a short rejoinder.

I.

On page 5 of appellee's brief it is said:

> "It is conceded by counsel, at page 11 of their brief, the complaint in this case is not an action in forcible entry and detainer, and they proceed to demonstrate this by quoting sections of the Oregon Code defining such actions and providing what must be shown to constitute an unlawful holding by force."

By turning to page 11 of our brief, it will be seen that we said:

> "This complaint neither alleges the forcible entry nor the forcible detention of the property. The Legislature of Oregon saw fit to declare what should be an unlawful holding by force."

Then we quoted sections 3519 and 3520 of Hill's Oregon Code. This language is taken from the third point of our argument, in which we contend that the demurrer to the complaint should have been sustained. That paragraph of our argument begins on page 10, and it starts with the position that the pleader having failed to comply with the statutory provisions which we had copied in the preceeding pages, it would be considered by the law that he endeavored to bring the action as in forcible entry and detainer, under the ruling in *Thompson vs. Wolf*, 6 Or., 308, 311, and *Johnson vs. Crookshanks*, 21 Or., 339. What we said on this entire subject was in the way of legal argument, not as an admission or concession of fact. We do not understand that counsel can make the law by their concessions or admissions, although they may establish facts thereby.

Even a cursory examination of our original brief, pages 6 to 12 inclsuive, will show that we were arguing that the complaint was not sufficient in law, no matter what might be its nature, although under the cases above cited it would have to be treated as in forcible entry and detainer.

II.

The long settled rule is that the jurisdiction of this court on an appeal from the Supreme Court of a Territory, *apart from exceptions duly taken to rulings on the admission or rejection of evidence*, is limited to determining whether the findings of fact support the judgment because these findings are conclusive upon this court. *Harrison vs. Perea*, 168 U. S., 311, 323, and numerous cases there cited. As was said in *Holloway vs. Dunham*, 170 U. S., 615, 617, on the authority of the cases above cited, this court can not examine the evidence as to its weight or sufficiency on an appeal from the Supreme Court of a Territory, and the findings of fact are conclusive.

Again in *Young vs. Amy*, 170 U. S., 179, 183, the court said:

> "It is settled that on error or appeal to the Supreme Court of a Territory this court is without power to re-examine the facts and is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admission or rejection of testimony when the action of the court in this respect has been duly excepted to, and the right to attack the same preserved on the record. Harrison *vs.* Perea. 168 U. S., 311, and authorities there cited."

Counsel for appellee rely upon *Young vs. Amy* to support their proposition that this court can not examine and review the objections to the evidence introduced by the plaintiff without examining the

weight of the evidence and disregarding the facts as found. In that case it is said on page 185 of the report:

> "We will consider the assignments in their logical order. The first to the eleventh, inclusive, and the nineteenth, complain of errors, which it is alleged the Supreme Court committed in admitting certain evidence. But all the evidence objected to was received by the trial court subject to the objection, and the question of its admissibility *turned on that of its irrelevancy and on the quantum of proof which it would establish if considered.*"

We have italicised the clause which clearly distinguishes that case from the one at bar. In *Young vs. Amy*, the questions were, first, of relevancy, second the quantum of proof which the evidence would establish if considered at all. In the case at bar, the assignments, from two and one-half to ninth inclusive, are based upon the action of the trial court in permitting to be introduced and read in evidence certain documents and alleged records notwithstanding objections to their admissibility in evidence for any purpose. *All these objections asserted that the papers and alleged records were incompetent.* See pages 12 to 27 of appellant's original brief. The objections were not on the ground of relevancy alone, nor did they relate to the quantum of proof which would be established thereby if considered. The objections were all of a kind and character not presented by the record in in the case of *Young vs. Amy.* Therefore, that case is applicable to this case as authority only to the

extent that it holds that on appeal from the Supreme Court of a Territory, this court has the power and the right to review errors committed in the admission or rejection of testimony, when the action of the trial court in this respect has been duly excepted to, and the right to attack the same has been preserved on the record.

In the case at bar, the question of the admissibility of the evidence offered turned on its competency. This court can pass upon the question of competeney without examining the weight of the evidence in the record and without disregarding the facts found by the trial court. If this court should consider that papers or alleged records had been admitted in evidence which were not competent as evidence, then it will rightfully reverse the judgment of the court below, to the end that there may be another trial of the case in which such evidence will be excluded, if offered, and not be considered by the court, thus securing a trial and determination of the case according to law.

III.

Near the bottom of page 20 of the record, the trial court, referring to the defendant's objections to certain evidence offered, said:

> "The ground on which I hold these instruments admissible is they are evidence tending to show occupation and possession."

On page 10 of appellee's brief, this language is quoted and counsel say:

> "The original deed to the plaintiff, and oral evidence showing occupation and possession by plaintiff and his grantors since April 19, 1891, was also introduced. This court can not, therefore, consider these objections to *a part only* of the evidence introduced, under the findings of fact as set out by the court, without going into its weight and making independent conclusions of fact. This we have seen, the court will not do."

Section 2387 Revised Statutes was not operative in Alaska until the enactment of the law of March 3, 1891. 26 Stats. 1099. The town of Juneau was entered under the authority of the latter act, October 13, 1893. A patent thereof was issued September 4, 1897. The initiation and continuation of a valid claim to lots in Juneau depended, therefore, upon the establishment and maintenance of occupancy up to October 13, 1893. Such an interest could not be sold before the entry under the townsite law, but for the vendor's occupancy thereof to inure to the benefit of the vendee, the latter must continue the occupancy with no breach in the continuity thereof, for otherwise a stranger could go upon the land and, finding it in a state of abandonment, establish occupancy for himself and defeat the claims of both vendor and vendee.

Carroll vs. Price, 81 Fed. Rep., 137.
Hussey vs. Smith, 99 U. S., 20.
Stringfellow vs. Cain, 99 U. S., 610.

So the questions of occupation and possession were inevitably and, for the reasons above stated,

the controlling questions in the case, and it was with reference to them only that the trial court held admissible in evidence the instruments objected to in assignments of error two and one-half to ninth, inclusive.

Thus, the record shows affirmatively that the court admitted these instruments because it was considered that they were of value in considering the questions of occupation and possession, which, as we have seen, were the great and overshadowing questions in the case, for when two persons claim such property adversely, prior possession gives prior right, and such possessory rights may be conveyed. *Carroll vs. Price*, 81 Fed. Rep., 137.

For years prior to the passage of the townsite law, persons had been in possession of much of the Alaskan lands, and this possession was confirmed by section 8 of the Act of May 17, 1884, which enacts that Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. This gave the inhabitants to understand that eventually those who maintained possession would be clothed with legal title. Transfers of possession could be established by the production of duly executed deeds, or by duly authenticated records. *Carroll vs. Price*, 81 Fed. Rep., 137.

The trial court admitted the pretended writing and records to be introduced upon the theory that they were admissible in evidence for the purpose of

showing occupation and possession. If this court finds from a consideration thereof that they were not admissible in evidence, and therefore should not have been considered as showing occupancy and possession, then it will follow that the judgment of the court below should be reversed.

IV.

On page 12 of appellee's brief it is said:

> "Again, an examination of the record, at page 50, shows that these judgment defendants were served by publication only. It will be seen also by an inspection of the same page of the record that a personal judgment was rendered upon this substituted service."

Thereupon counsel claims that the court had no power to render a judgment *in personam*, that this personal judgment is void, and no sale of lands made upon it could give any title whatever. Counsel are speaking of the sale of the property of the Alaska Mercantile and Packing Company upon a judgment against Van Gasken and Birmingham. Turning to page 50 of the record, we find at the top of the page the usual entry of default against the defendants as "having been regularly served with process by publication and having failed to appear and answer." This entry was made July 13, 1891. On the 25th of July, the court rendered judgment, which is copied on page 50 of the record, and which begins as follows:

> "In this action, the defendant having been regularly served with process, and having failed to appear and answer the plaintiff's

> complaint filed herein, and the legal time for answering having expired and no answer or demurrer having been filed, the default of said defendants in the said premises having been duly entered according to law, now, at this day, * * * it is hereby ordered that judgment be entered herein against said defendants in accordance with the prayer of said plaintiff's complaint on file herein."

Thereupon the court proceeded to render the usual judgment *in personam* against the defendants therein named, "partners or formerly partners as the Alaskan Mercantile and Packing Company, for the sum of $350.75."

We submit that all presumptions lie in favor of this judgment, and that, in view of the recital that the defendants had been regularly served with process, this court will presume, in the absence of evidence to the contrary, that such service was made as justified the court in entering a personal judgment against them.

Respectfully submitted,

W. W. DUDLEY,
L. T. MICHENER,
OSCAR FOOTE,
Attorneys for Appellant.

o

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 288.

JOHN F. MALONY,
Appellant,

vs.

O. H. ADSIT,
Appellee.

Appeal from the District Court of the United States for the District of Alaska.

APPELLEE'S BRIEF.

STATEMENT.

This was an action of ejectment commenced in the District Court of the United States for the District of Alaska, by the appellee to recover possession of an undivided one-half of Lot 4, in Block 4, in the town of Juneau, Alaska. Demurrer was filed to the complaint which was overruled and exception taken. Answer was filed in denial and setting up title, to which reply was filed. Judgment was rendered for plaintiff, and after overruling motion for new trial appeal was taken by defendant to this court.

THE ISSUES.

There is no assignment of errors on behalf of appellant in this court, but the appellant insists in this court upon the errors assigned in the uncompleted appeal to the Circuit Court of Appeals for the ninth circuit, which was transmitted to this court.

These assignments seek to bring in review the questions of the admissibility of certain evidence introduced by plaintiff; the overruling of demurrer to the complaint; overruling defendant's motion for non-suit at the close of the case, for failure of proof, and overruling motion for new trial.

ARGUMENT.

I.

Sufficiency of the Complaint.

The complaint is sufficient as a complaint in ejectment, or, as it is termed in the Oregon Civil Code an "Action for the possession of real property."

It is objected that it does not appear from the complaint, that plaintiff has a legal estate in real property and the nature of such an estate, whether in fee or for life, or for a term of years, as provided by the laws of Oregon.

The allegation in the complaint is, that "the plaintiff and his grantors have been the *owners* by right of prior occupancy and actual possession," etc.

We insist this is a full compliance with the Civil Code of Oregon, which requires the plaintiff in such actions to set forth "the nature of his estate in the property, whether it be in fee, for life, or for a term of years." If plaintiff was the "Owner" by right of prior occupancy and actual possession of the premises in dispute, it was the highest and best title which could be acquired. It was a part of the town of Juneau, the naked legal title to which was in the United States, or in the Townsite Trustee, in trust for those who were "*owners by prior occupancy and actual possession*," the only source of

right to the title in fee, recognized by the United States. It gave the priority of right to the fee. The nature of plaintiff's title, "whether in fee, for life or for a term of years," as required by the Oregon Code is thus sufficiently described by the use of the term "Owner."

This was settled by the Supreme Court of Oregon in the case of Johnson *vs.* Crookshank, 21st Oregon 339, citing Lepell *vs.* Kleinschmeidt, 11 N. Y. 364; Illinois Mutual Fire Insurance Company *vs.* Marsailes Manufacturing Company, 1 Gilm. 236; Jarrott *vs.* Vaughn. 2 Gilm. 132; and Hadlock *vs.* Hadlock 22 Ill. 384. See also Bennett *vs.* Harkrader, 158 U. S. 441.

It is contended that the complaint is insufficient because it is averred that the defendant has ousted the plaintiff of an undivided half interest, one James Winn being owner of the other undivided half.

It is clear one tenant in common may maintain ejectment when there is actual ouster. Barnitz *vs.* Casey 7 Cranch 456; Jackson *et al vs.* Sample, 1 John, N. Y. 231; Hammond *et al vs.* Morrison's Lessee, 33 M. D. 95; Avery *vs.* Hall, 50 Vt. 11; Vance *vs.* Schroyer, 77 Ind; 501; Ricard *vs.* Williams, 7 Wheat 59 and Norris *vs.* Sullivan 47 Conn. 474.

As to the necessity for the plaintiff to allege that he has the legal title, it is not required in a case where the plaintiff has been in the prior possession, against a mere intruder or wrong-doer, or a person subsequently entering without right. Christy *vs.* Scott, 55 U. S. (14 How. 282) DeSabariego *vs.* Maverick 124 U. S. 261; Turner *vs.* Aldridge 1st McAll (U. S.) 229; Wilson *vs.* Fine, 38 Fed. Rep. 789, and cases cited; Slater *vs.* Rawson, 6 Mch. (Miss.) 438;

Hubbard *vs.* Little, 9 Cush (Mass.) 475. See also cases cited in Note 2, Vol. 26, Am. and Eng. Encl. of Law, p. 32.

But, be this as it may, as we have seen, the allegation in the complaint, of "Ownership," constitutes a good cause of action, under the Oregon Code as construed by the Supreme Court of that state, in the case of Johnson *vs.* Crookshank, *supra.* The allegation being sufficient to constitute a cause of action the demurrer was properly overruled.

The Statute of Limitation.

It is argued that if the complaint should be held sufficient otherwise, it must fall for the reason that the action was not commenced within three years from the time the defendant's possession began.

Counsel quote Sec. 3524, Hill's Oregon Code, in support of their position. This section is as follows:

> "In an action to recover the possession of any land tenement, or other real property, *where the entry is forcible*, or when the possession is unlawfully *held by force*, the merits of the title shall not be inquired into; and three years' quiet possession of the premises immediately preceding the commencement of such action by the party in possession, or those under whom he holds, may be pleaded in bar thereof, unless the estate of such party is ended."

It is insisted that this statute covers all actions brought to recover the possession of real property, but it will be observed by its very terms it is restricted to cases where "the entry is forcible, or where the possession is unlawfully held by force." This clearly applies to actions of forcible entry and detainer, and to none other. In this case it is not alleged the entry was "forcible," or that the sop-

session is "unlawfully held by force." It is clear therefore this section has no application whatever to the case made by the complaint in the case at bar.

It is conceded by counsel, at page 11 of their brief, the complaint in this case is not an action in forcible entry and detainer, and they proceed to demonstrate this by quoting sections of the Oregon Code defining such actions and providing what must be shown to constitute an unlawful holding by force.

This then being an action in ejectment, and the statute of limitation applying only to actions in forcible entry and detainer, this objection to the complaint is not well-taken.

As to the assignment of error, based upon the overruling by the court of appellant's motion for judgment of non-suit made at the close of the plaintiff's case, if any error was committed, it was waived by defendant proceeding to give evidence in support of the issues on his behalf (Rec. p. 38).

In the case of the Union Pacific Railway Co. *vs.* Snyder, 152, U. S. 684, it was held that:

> "An exception to a denial of a motion to dismiss the complaint made at the close of plaintiff's evidence is waived by defendant afterwards, proceeding with the case and giving evidence on his part."

The action of the court, therefore, in overruling defendant's motion for non-suit cannot be assigned for error.

Sufficiency of the Evidence.

By stipulation of the parties, in open Court, a jury trial was expressly waived, and by consent the cause was tried by the court, who made a finding of the facts proven, and submitted his conclusions of law from the facts so found, and rendered judgment thereon and threfrom, in favor of the plaintiff, awarding him possession of the land in controversy and costs of suit. From this judgment, after the overruling of motion for new trial, appeal was taken to this court.

Under the well-settled rule of this Court, upon an appeal from the Supreme Court of a Territory, the findings of fact by that court are conclusive upon the Supreme Court of the United States. Harrison *vs.* Perea, 168 U. S. 311 and cases cited. Also Holloway *vs.* Dunham 170 U. S. 615; and Young *vs.* Amy 171 U. S. 179.

It is true, this court has held that alleged errors in the admission or rejection of the evidence, if duly excepted to, might be reviewed in such cases.

But, it is also held this can not be done in a case where to do so involves an examination of the weight of the evidence and disregarding the facts so found. Young *vs.* Amy, *supra;* Marshall *vs.* Brutis, No. 118, decided by this court, January 30, 1899.

In the case at bar the court made the following findings of fact:

> "1. That on the 19th day of April, 1881, the plaintiff and his grantors entered into actual possession of all that certain lot, piece or parcel

of land described in the complaint as Lot numbered four (4), in Block numbered four (4), in the town of Juneau, District of Alaska according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881 by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, said lot being situated on the corner of Second and Franklin Streets in said town of Juneau, claiming said lot, piece or parcel of land in their own right; and the said plaintiff and his grantors have, ever since the date last aforesaid, occupied, used and possessed said lot or piece or parcel of land, having erected a substantial frame or wooden building or structure thereon, using and claiming the same in their own right from that date to the present time adversely to all the world, and especially as against the defendant.

"2. That the plaintiff is the owner of an undivided half (½) part or interest of, in, and to said Lot No. 4, in said Block No. 4, hereinbefore described, and that the whole of said lot, piece or parcel of land in the complaint described lies within the said town of Juneau, Alaska.

"3. That on or about the 29th day of April, 1891, the defendant, without right or title so to do, entered on and upon said described lot, piece or parcel of land in the complaint described and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto has wrongfully withheld the possession thereof from the said plaintiff."

And as conclusions of law from these facts, the court found and decided as follows:

"1. That the plaintiff is the owner and entitled to the possession of an undivided one-half part or interest of, in, and to said lot, piece, or parcel of land as the same is described in the complaint on file herein as against the defendant and all persons claiming or to claim the same or any part of said right or interest of the plaintiff in and to said lot, piece, or parcel of land under him, the said defendant, and that the defendant has no right, title or interest in or to said land or any part thereof.

"2. That the plaintiff is entitled to a judgment as prayed for in his complaint, for the recovery of the possession of an undivided one-half part or interest of, in, and to said Lot No. 4, in said Block No. 4, in said town of Juneau, against said defendant and all persons claiming or to claim the said or any part thereof under or through the said defendant.

"3. That the plaintiff is entitled to a judgment for costs, to be taxed herein against the defendant."

That the facts found by the court are sufficient to support the decision and judgment of the court, will hardly be questioned.

Can this court undertake to examine and review the objections to the evidence introduced by the plaintiff, without examining the weight of the evidence and disregarding the facts as found? We think not. This being the case, the only remaining question for review is, that of the sufficiency of the evidence to support the conclusions of law and judgment rendered.

In the case of Young *vs.* Amy, *supra*, this Court, referring to the question of its right to review the

objections made to the admission or rejection of evidence said:

> "But the express finding from all the evidence by the Supreme Court of the State is that the summons in the divorce suit was duly issued and published according to law, and that the defendant had, besides, personal notice of the pendancy of the suit. This conclusion being binding upon us, establishes that the evidence was relevant and material, and there was no ground to reject it. We can not, therefore, say that the evidence should have been disregarded, because it did not establish the facts which we are bound to conclude it did fully prove. If specific findings of each item of evidence and the conclusions deduced from the separate items had been made as in Cheely *vs.* Clayton, 110 U. S. 702, the case would present a different aspect, considering, however, the state of the record and the nature of the findings of fact certified, we can not determine the correctness of the objections to the evidence without going into its weight and making independent conclusions of fact; in other words, without disregarding the findings made by the court below, by which we are concluded."

So, in the case at bar, the objections were to the record of the original location of the ground in controversy, and to the record of the various deeds showing a connected chain of title from such locator to the plaintiff.

The principal objection was that the records of the recorder's office for the District, or certified copies of records were introduced, without accounting for the absence of the original.

Near the bottom of page 20 of the Record, the court referring to the defendant's objections said:

> "By the court: There is one point suggested by Mr. Trumbell, and that is you have not laid the foundation for this evidence. *The ground on which I hold these instruments admissable is they are evidence tending to show occupation and possession.*"

The original deed to the plaintiff, and oral evidence showing occupation and possession by plaintiff and his grantors since April 19, 1891, was also introduced. This court cannot, therefore, consider these objections to *a part only* of the evidence introduced, under the finding of facts as set out by the court, without "going into its weight and making independent conclusions of fact." This, we have seen, the court will not do. Hence we will not further discuss these objections.

The Act of 1884.

By the act of Congress of May 17, 1884 (23 Stat. at L. 24) it was provided that:

> "The Indians or other persons in said District (Alaska) shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

At the date of the passage of this act, the grantor of the plaintiff had been in actual possession and occupation of the premises in controversy, claiming it by right of prior occupancy, to the exclusion of

all the world, for a period of more than a year. (See location notice, Rec. p. 29).

His right to the possession and occupancy of the tract was confirmed, and his protection therein guaranteed by this act. The only condition annexed to his claim was, that Congress reserved the right to prescribe the *terms* under which he might acquire title to the land, which *terms*, it was promised, should be provided in future legislation by Congress.

It follows therefore, that upon the finding by the lower court, that the plaintiff and his grantors, on the 19th day of April, 1881, entered into actual possession of the land in controversy, claiming said parcel of land, in their own right, and that they have ever since said date occupied, used and possessed said tract, having erected a substantial frame or wooden building thereon using and claiming the same in their own right from that date to the present time adversely to all the world, and especially as against the plaintiff, he is clearly entitled to a judgment for the possession of the premises, under the confirmation and guarantee given by Congress in the Act of 1884, *supra*, supplemented by the promised terms, which were provided by the Act of March 3, 1891, under which he asserts title.

Appellant's Claim.

Appellant claims the property under a marshal's deed and upon a judgment against VanGasken and Birmingham, but the Record shows they never owned the property as a firm, and that VanGasken, who once claimed it, had conveyed it to the Alaska Commercial and Packing Company, by deed, nearly

three years before the suit upon which judgment was rendered and the sale made was commenced, and before it is even claimed any lien attached to the property. It follows that the sale of the property of the Alaska Commercial and Paking Company a duly incorporated company, upon a judgment against VanGasken and Birmingham, is a nullity. And, besides, there is in the record, the written notice given by the attorney of the company, to the Marshal after he received the writ and before he made the sale, that the land was the property of the company and not of VanGasken and Birmingham. It was also admitted by the appellant that he heard the said attorney for the company give a similar notice at the time of the sale. Appellant and his grantors were therefore, purchasers with full knowledge that the land was not the property of the judgment and execution defendants, but of the grantors of the appellee.

It follows that under no circumstances has he any right to the possession of the land in controversy, and the possession taken by him was tortuous and wrongful from the beginning.

Again, an examination of the Record, at page 50, shows that these judgment defendants were served by *publication only*. It will be seen also, by an inspection of the same page of the record, that a personal judgment was rendered upon this substituted service. And, although an attachment was issued, the marshal's return and recitals in the deed executed by him show the sale was made upon a levy under the execution, after a return of no personal property found, and the attachment was abandoned.

Now, the court had no power to render a judgment *in personam*, upon this notice by publication only. Such a judgment could be rendered only where personal service upon the defendants is affirmatively shown by the Record, or waived by them. Penoyer *vs.* Neff 95 U. S. 704; Cooper *vs.* Reynolds 77 U. S. 308; Owens *vs.* McCloskey 161 U. S. 642; Davis *vs.* Wakler 156 U. S. 680.

It follows that this personal judgment rendered upon notice by publication is void and no sale made upon it could give any title whatever. Hence, Malony's claim based upon the sale would be void, even if the judgment defendants had been the owner's of the lot at the date of the levy.

The attempt to tack on to this unfounded claim, the additional one, that the property was abandoned by the grantors of the appellee, and hence open to appropriation by the appellant, finds no support in the evidence in the Record, and is conclusively settled against him by the findings of fact by the lower court, which we have seen are conclusive upon this court.

Upon the whole case we insist the judgment of the United States District Court for the District of Alaska is correct and should be in all things affirmed.

S. M Stockslager,
George C. Heard,
Attorneys for Appellee.

No. 67.

Office Supreme Court U.S.
FILED
OCT 26 1899
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

JOHN F. MALONEY,
Appellant,
vs.
O. H. ADSIT,
Appellee.

No. 67. October Term, 1899.

Authorities cited or referred to by counsel for appellee in oral argument, which are not on the brief:

Bearing upon the sufficiency of complaint, involving possessory title only:

Lamb *vs.* Davenport, 1 Sawyer, 609. Affirmed by the Supreme Court of the United States, 80 U. S., 418.
People *vs.* Shearer, 30 California, 645.
Richardson *vs.* McNulty, 24 California, 339.
Moon *vs.* Rollins, 36 California, 339.
Mickey *vs.* Stratton, 5 Sawyer, 475.

Decisions involving Alaska lands:

Campbell *vs.* Silver Bow, &c., Mining Co., 49 Fed. Rep., 47.
Miller *vs.* Blackett, 47 Fed. Rep., 547.
Carroll *vs.* Price, 81 Fed. Rep. 137.

Bearing upon Bill of Exceptions:

Section 233, Hill's Annotated Statutes, Oregon: "The statement of the exceptions, when settled and allowed,

shall be signed by the judge and filed with the clerk, and thereafter it shall be decreed and taken to be a part of the record of the cause." * * *

In the English and American Encyclopædia of Law, vol. 12, p. 13, the general rule is thus stated:

"In the absence of statutory provision, the approval of the judge who presided at the trial is indispensable to the statement of facts in order that they shall receive attention on appeal." (See cases cited in support of text.)

There does not seem to be any statutory provision in Oregon authorizing the signing of a Bill of Exceptions by any one except the trial judge.

S. M. STOCKSLAGER,
GEORGE C. HEARD,
Atty's for Appellee.

jurisdiction to review that judgment; and the writ of error is accordingly

Dismissed.

MALONY *v.* ADSIT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

No. 67. Argued October 25, 26, 1899. — Decided December 4, 1899.

Allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial; and section 953 of the Revised Statutes is intended to provide and does provide that no bill of exceptions can be deemed sufficiently authenticated, unless signed by the judge who sat at the trial, or by the presiding judge if more than one sat.

This action being an action of ejectment, the provision in § 3524 of the Oregon Code with regard to actions for forcible entry and detainer have no application to it.

In May, 1896, Ohlin H. Adsit filed a complaint against John F. Malony in the United States District Court for the District of Alaska, to recover possession of the undivided one half of a tract of land in the town of Juneau, District of Alaska. The complaint averred that on the 29th day of April, 1891, and for more than nine years prior thereto, the plaintiff and his grantors were the owners by right of prior occupancy and actual possession, of the land in question, and that plaintiff was entitled to the possession thereof; that one James Weim was the owner of the other undivided one half part of said land; that on or about the 29th day of April, 1891, the defendant and his grantor, without right or title so to do, entered thereon, and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto have wrongfully withheld possession from the plaintiff.

The plaintiff prayed judgment for the recovery of the possession of an undivided one half part or interest of, in and to the whole of the described premises, and for his costs and disbursements in the action.

Statement of the Case.

On June 8, 1896, the defendant demurred to the complaint, on the alleged ground that the same did not state facts sufficient to constitute a cause of action.

On October 9, 1896, the court overruled the demurrer, and gave leave to the defendant to file an answer. An answer and replication thereto were filed. The case was tried August 10, 1897, before Arthur K. Delany, District Judge, a jury having been waived. Judge Delany made the following findings of facts and conclusions of law:

"This cause having been regularly called for trial before the court — a jury trial having been expressly waived by stipulation in open court of the respective parties appearing herein — Johnson & Heid appeared as attorneys for the plaintiff and John F. Malony, the defendant herein, appeared in proper person; and the court having heard the proofs of the respective parties and considered the same and the records and papers in the cause and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

"I. That on the 19th day of April, 1881, the plaintiff and his grantors entered into actual possession of all that certain lot, piece or parcel of land described in the complaint as lot numbered four (4), in block numbered four (4), in the town of Juneau, District of Alaska, according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881 by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, said lot being situated on the corner of Second and Franklin streets, in said town of Juneau, claiming said lot, piece or parcel of land in their own right; and the said plaintiff and his grantors have, ever since the date last aforesaid, occupied, used and possessed said lot or piece or parcel of land, having erected a substantial frame or wooden building or structure thereon, using and claiming the same in their own right from that date to the present time adversely to all the world, and especially as against the defendant.

"II. That the plaintiff is the owner of an undivided one half (½) part or interest of, in and to said lot No. 4, in said

block No. 4, hereinbefore described, and that the whole of said lot, piece or parcel of land in the complaint described lies within the said town of Juneau, Alaska.

"III. That on or about the 29th day of April, 1891, the defendant, without right or title so to do, entered on and upon said described lot, piece or parcel of land in the complaint described, and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto has wrongfully withheld the possession thereof from the said plaintiff.

"As conclusions of law from the foregoing facts the court now hereby finds and decides:

"1. That the plaintiff is the owner and entitled to the possession of an undivided one half part or interest of, in and to said lot, piece or parcel of land as the same is described in the complaint on file herein as against the defendant and all persons claiming or to claim the same or any part of said right or interest of the plaintiff in and to said lot, piece or parcel of land under him, the said defendant, and that the defendant has no right, title or interest in or to said land or any part thereof.

"2. That the plaintiff is entitled to a judgment, as prayed for in his complaint, for the recovery of the possession of an undivided one half part or interest of, in and to said lot No. 4, in said block No. 4, in said town of Juneau, against said defendant and all persons claiming or to claim the same or any part thereof under or through the said defendant.

"3. That the plaintiff is entitled to a judgment for costs, to be taxed herein, against the defendant.

"And judgment is hereby ordered to be entered accordingly."

On August 11, 1897, a motion for a new trial was made and overruled. Judgment for the plaintiff was duly entered, and on September 20, 1897, the plaintiff was put in possession of the premises in dispute, in pursuance of a writ of possession allowed by Charles S. Johnson, Judge of the United States District Court, who had succeeded Arthur R. Delany to that office.

On September 6, 1897, the defendant gave notice of an

appeal to the United States Circuit Court of Appeals for the Ninth Circuit. On January 4, 1898, the defendant, acting on a decision of the Supreme Court of the United States, wherein it was held that such causes were not appealable to the Circuit Court of Appeals, but that appeals in such cases should be prosecuted to the Supreme Court of the United States, prayed for an appeal to this court, which was on said day allowed as prayed for by Judge Johnson.

On January 4, 1898, a bill of exceptions was filed, to which was appended a statement, signed by the respective counsel, that the bill of exceptions was correct and in accordance with the proceedings had in the trial of the cause; and the record discloses that, on said 4th of January, 1898, the bill of exceptions was settled and allowed by Judge Johnson.

Mr. L. T. Michener for appellant. *Mr. W. W. Dudley* and *Mr. Oscar Foote* were on his brief.

Mr. S. M. Stockslager for appellee. *Mr. George C. Heard* was on his brief.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

An inspection of this record discloses that the bill of exceptions was not settled, allowed and signed by the judge who tried the case, but by his successor in office, several months after the trial. It is settled that allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial. What took place at the trial, and is a proper subject of exception, can only be judicially known by the judge who has acted in that capacity. Such knowledge cannot be brought to a judge who did not participate in the trial or to a judge who has succeeded to a judge who did, by what purports to be a bill of exceptions, but which has not been signed and allowed by the trial judge.

Section 953 of the Revised Statutes is as follows: "A bill

of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat at the trial of the cause, without any seal of court or judge being annexed thereto."

We understand this enactment to mean that no bill of exceptions can be deemed sufficiently authenticated unless signed by the judge who sat at the trial, or by the presiding judge if more than one sat.

In *Mussina* v. *Cavazos*, 6 Wall. 355, 363, after the case had been elaborately argued on the merits, it was discovered by the court that the bill of exceptions had not been either signed or sealed by the judge below. Thereupon the court delivered the following opinion: "Whatever might be our opinion of the exceptions which appear in the record, if they were presented in such a way that we could consider them, we find them beyond our reach. The bill of exceptions, or what purports to be a bill of exceptions, covering more than three hundred and fifty pages of the printed record, is neither signed nor sealed by the judge who tried the cause; and there is nothing which shows that it was submitted to him or in any way received his sanction. We are therefore constrained to affirm the judgment."

Boroscale v. *Bosworth*, a case reported in 98 Mass. 34, presented a somewhat similar question. There a judge of the trial court took a bill of exceptions that had been substantially agreed on by the parties and duly filed, to examine whether the statement of his rulings was correct, with the understanding that if correct he should allow the bill. However, the judge retained the bill without allowing it for more than a year, and resigned his office without having done so. Afterwards, in such circumstances, a motion was made for a new trial in the trial court, and allowed. To the ruling which allowed a new trial the plaintiffs took an exception and carried the case to the Supreme Judicial Court. That court refused to disturb the order of the court below awarding a new trial, and held that where it appears to the court that a party has been deprived, without his fault, of a right

or remedy which the law gives him, it would generally be held a legal reason for granting a new trial. The court cited the English cases of *Nind* v. *Arthur*, 7 Dowl. & Lowndes, 252, where upon the death of Mr. Justice Coltman, before allowing a bill of exceptions which had been presented to him, a new trial was granted; also *Bennett* v. *P. & O. Steamship Company*, 16 C. B. 29, where the settling of a bill of exceptions having been delayed by the appointment of Chief Justice Wilde as Lord Chancellor, and afterwards by reason of his infirm health all hope of it having been lost, a new trial was granted by the trial court. Also the case of *Newton* v. *Boodle*, 3 C. B. 796, where the death of Chief Justice Tindal prevented the sealing of a bill of exceptions, without laches of the excepting party, was regarded as good ground for a motion for a new trial.

The *rationale* of these cases evidently was that the court of errors could not consider a bill of exceptions that had not been signed by the judge who tried the case, and that such failure or omission could not be supplied by agreement of the parties, but that the only remedy was to be found in a motion for a new trial.

Those cases were cited with approval by this court in *Hume* v. *Bowie*, 148 U. S. 245, where it was held that where the judge presiding at the trial of a cause in the Supreme Court of the District of Columbia at circuit dies without having settled a bill of exceptions, it is in order for a motion to be made to set aside the verdict and order a new trial, and that, where such an order is made by the court in general term, it is not a final judgment from which an appeal may be taken to this court. It is true that there is a rule of the Supreme Court of the District of Columbia which provides that in case the judge is unable to settle the bill of exceptions and counsel cannot settle it by agreement a new trial shall be granted, and that this court regarded that rule as applying to the case in hand, and that hence a new trial was a matter of course.

In *Young* v. *Martin*, 8 Wall. 354, where the exceptions were noted by the clerk of the trial court and so appeared

in the record, it was held that "to be of any avail exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the points raised, but they must be signed and sealed by the presiding judge. Unless so signed and sealed they do not constitute any part of the record which can be considered by an appellate court."

In *Origet* v. *United States*, 125 U. S. 240, 243, the record contained a paper headed "Bill of Exceptions." At the foot of the paper appeared the following: "Allowed and ordered on file, Nov. 22, '83. A. B." And it was held, "This cannot be regarded as a proper signature by the judge to a bill of exceptions, nor can the paper be regarded for the purposes of review as a bill of exceptions. . . . Sec. 953 of the Revised Statutes merely dispensed with the seal. The necessity for the signature still remains. We cannot regard the initials 'A. B.' as the signature of the judge, or as a sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or court. Therefore the questions purporting to be raised by the paper cannot be considered."

In *State* v. *Weiskittle*, 61 Maryland, 51, it was said: "In this State it is not admissible for another judge to pass upon the correctness of his predecessor's ruling in such a case. The new trial will go as a matter of course."

It certainly cannot be contended that if the trial judge is able officially to sign the bill of exceptions, it would be competent for the counsel to dispense with his action, and rely upon an agreed statement of the facts and law of the case as tried. Nor can they agree that another than the trial judge may perform his functions in that regard. In *Lynde* v. *Craney*, 95 Michigan, 109, it was said that the practice of stipulating a bill of exceptions without the sanction of the judge cannot be commended; and if such fact be brought to the attention of the court before the argument of the case, the appeal will be dismissed.

In *Coburn* v. *Murray*, 2 Maine, 336, it was held that a bill unauthenticated by the trial judge cannot be given validity by consent of counsel.

We are referred to no decision of this court on the precise question whether counsel can stipulate the correctness of a bill of exceptions not signed by the trial judge. But we think that on principle this cannot be done, and we regard the cases just cited as sound statements of the law.

Accordingly, our conclusion is that the errors of the trial court alleged in the bill of exceptions, unauthenticated by the signature of the judge who sat at the trial, cannot be considered by us.

The defendant's demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, and the defendant not having elected to stand on his demurrer, but having availed himself of the leave of the court to file an answer, and his several objections to the admission of evidence at the trial not having been brought before us by a proper bill of exceptions, all that is left for us to consider is whether, on the facts found by the court below, the plaintiff was entitled to judgment.

Those facts, briefly stated, were that the plaintiff and his grantors on April 19, 1881, entered into actual possession of the land in dispute; put substantial improvements thereon; and continued in possession, under claim of right, and adversely against the defendant and all others, till on April 29, 1891, the defendant, without right or title so to do, entered upon the said land, and ejected the plaintiff therefrom; that the plaintiff was the owner of an undivided one half part or interest of, in and to said land in the complaint described, and that the defendant wrongfully withheld the same from him.

From the findings the court drew the conclusions of law that the plaintiff was entitled to recover possession of the said land in dispute, being the undivided one half part or interest of, in and to said lot No. 4, in said block No. 4, in said town of Juneau, against said defendant and all persons claiming under him, and to recover a judgment for said possession and for costs.

The appellant now contends that, under section 318 of Hill's Oregon Code, (which by the act of May 17, 1884 — 23 Stat. 84 — was made applicable to Alaska, and which is in the follow-

ing terms: "The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him, to his damage such sum as may be therein claimed,") the plaintiff failed to plead the nature of his estate in the property, whether it be in fee, for life or for a term of years.

Without stopping to consider whether the defendant could be heard to again raise a question that had been decided against him on his demurrer to the complaint, we think that the objection is not a sound one. The plaintiff alleged, and the court has found, that for more than nine years prior to April 29, 1891, he and his grantors were the owners by right of prior occupancy and actual possession of the land in dispute.

In the condition of things in Alaska under the act of May 17, 1884, c. 53, 23 Stat. 24, providing a civil government for Alaska, and under the twelfth section of the act of March 3, 1891, c. 561, 26 Stat. 1094, 1100, the only titles that could be held were those arising by reason of possession and continued possession, which might ultimately ripen into a fee simple title under letters patent issued to such prior claimant when Congress might so provide by extending the general land laws or otherwise. *Davenport* v. *Lamb*, 13 Wall. 418.

In *Bennett* v. *Harkrader*, 158 U. S. 441, 447, brought to this court by a writ of error to the District Court of the United States for the District of Alaska, it was said by Mr. Justice Brewer, in disposing of a somewhat similar objection: "Where the complaint alleges that the plaintiff is entitled to the possession of certain described property, which is unlawfully detained by the defendant, and the possession of which the plaintiff prays to recover, a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint. Again, in this action, brought under a special statute of the United States in support of an adverse claim, but one estate is involved in the controversy. No title in fee is or can be established. That remains in the United States, and the only question presented is the priority of right to pur-

chase the fee. Hence the inapplicability of a statute regulating generally actions for the recovery of real estate, in which actions different kinds of title may be sufficient to sustain the right of recovery. It would be purely surplusage to find in terms a priority of the right to purchase when that is the only question which can be litigated in such statutory action."

This principle applies more strongly to the present case, in which the real nature of the plaintiff's estate in the property is truly alleged as ownership by right of prior occupancy and actual possession, and was so found to be by the trial court.

The same view of the nature of a title to a lot in a townsite in Alaska, under these acts of Congress, was expressed by the District Court of the United States for the District of Alaska, in the case of *Carroll* v. *Price*, 81 Fed. Rep. 137. As, then, the only kind of estate that could be held was that of possession, it was sufficient for the plaintiff to allege that his was of that nature.

It is next contended on behalf of the plaintiff in error that, even if the complaint should be held otherwise sufficient, yet the action must fail because coming within section 3524, Hill's Oregon Code, which is as follows: "In an action to recover the possession of any land, tenement or other real property, where the entry is forcible, or where the possession is unlawfully held by force, the merits of the title shall not be inquired into; and three years' quiet possession of the premises immediately preceding the commencement of such action by the party in possession, or those under whom he holds, may be pleaded in bar thereof, unless the estate of such party is ended."

It is argued that, as the complaint was filed in the court below May 25, 1896, more than five years from the day of entry alleged in the complaint, and as the defendant pleaded in bar of the action the three years' quiet possession of the premises immediately preceding its commencement, the defendant is entitled to a judgment of reversal.

If this were indeed an action in forcible entry and detainer, and as the complaint shows on its face that the defendant's possession was longer than three years prior to the commence-

ment of the action, then the defendant was entitled to have had his demurrer sustained. But he did not stand on his demurrer, but availed himself of the court's leave to answer; and hence it might well be questioned whether it was competent for him to again raise in his answer a question already ruled against him under his demurrer.

But this it is unnecessary to consider, because it is altogether clear that, on the complaint and the facts found, this was not an action for a forcible entry and detainer, under the section of the Oregon Code pleaded by the defendant, but was an action of ejectment to which the statute pleaded did not apply.

The judgment of the District Court of the United States for the District of Alaska is

Affirmed.